2008

Dee Henshaw v. The Estate of Jack King : Brief of Appellant

Utah Court of Appeals

Charles A. Schultz; attorney for appellant.
David R. Williams; Woodbury and Kesler; attorneys for appellees.

IN THE UTAH COURT OF APPEALS

vs.

Court of Appeals No. 200807[illegible]

District Court No. 00600007

PELLANT

This ppeal fro ly 18, 2008 Memorandum Deci
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lict holding that Raymond Watrous' interest in the w
rights that th old to the Watrouses, that Mrs. Watrous there
sequent to Mr. Watrous' death, that Barbara Her
l not pass to Dee Henshaw.

Charles A. Schultz
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The Utah Supreme Court had original appellate jurisdiction in this matter pursuant to Utah Code Annotated §78A-3-102. The Court of Appeals now has

jurisdiction of this matter pursuant to Utah Code Annotated §78A-4-103(2)(j).

V
ISSUES FOR REVIEW

Mr. Henshaw asserts the following issues on appeal:

A. Did the trial court err as a matter of law in denying Mr. Henshaw's Motion to Vacate that portion of the trial court's May 15, 2006 directed verdict holding that Raymond Watrous' interest in the water rights the Kings admit they sold to the Watrouses, that Mrs. Watrous thereafter sold to Barbara Henshaw and Barbara Henshaw sold to Dee Henshaw, did not pass to Dee Henshaw, because the Kings lacked standing to even assert that Raymond Watrous' interest in the water rights, that the Kings admit they sold to the Watrouses, did not pass to Mildred Watrous upon Raymond Watrous's death and ultimately to Mr. Henshaw? (Record at 1393).

Standard of Review: When a motion to vacate is based on a claim of lack of jurisdiction, it is reviewed under the correctness standard. 95 P.3d 1211; State of Utah v. All Real Property; 2004 UT App 232.

B. Did the trial court err in denying Mr. Henshaw's Motion To Vacate Under Rule 60(b)(4) URCP as "untimely?" (Record at 1360-1361).

Standard of Review: A denial of a motion under Rule 60(b) is ordinarily

reversed only on abuse of discretion. However, when the motion is based on a claim of lack of jurisdiction, the denial is reviewed for correctness. 95 P.3d 1211; State of Utah v. All Real Property; 2004 UT App 232.

VI
DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS

STATUTES:

UCA §75-1-201:

General definitions.

Subject to additional definitions contained in the subsequent chapters that are applicable to specific chapters, parts, or sections, and unless the context otherwise requires, in this code:

(1) "Agent" includes an attorney-in-fact under a durable or nondurable power of attorney, an individual authorized to make decisions concerning another's health care, and an individual authorized to make decisions for another under a natural death act.

(2) "Application" means a written request to the registrar for an order of informal probate or appointment under Title 75, Chapter 3, Part 3, Informal Probate and Appointment Proceedings.

(3) "Beneficiary," as it relates to trust beneficiaries, includes a person who has any present or future interest, vested or contingent, and also includes the owner of an interest by assignment or other transfer; as it relates to a charitable trust, includes any person entitled to enforce the trust; as it relates to a "beneficiary of a beneficiary designation," refers to a beneficiary of an insurance or annuity policy, of an account with POD designation, of a security registered in beneficiary form (TOD), or of a pension, profit-sharing, retirement, or similar benefit plan, or other nonprobate transfer at death; and, as it relates to a "beneficiary designated in a governing instrument," includes a grantee of a deed, a devisee, a trust beneficiary, a beneficiary of a beneficiary designation, a donee, appointee, or taker in default of a power of appointment, and a person in whose favor a power of attorney or a power held in any individual, fiduciary, or representative capacity is exercised.

(4) "Beneficiary designation" refers to a governing instrument naming a

beneficiary of an insurance or annuity policy, of an account with POD designation, of a security registered in beneficiary form (TOD), or of a pension, profit-sharing, retirement, or similar benefit plan, or other nonprobate transfer at death.

(5) "Child" includes any individual entitled to take as a child under this code by intestate succession from the parent whose relationship is involved and excludes any person who is only a stepchild, a foster child, a grandchild, or any more remote descendant.

(6) "Claims," in respect to estates of decedents and protected persons, includes liabilities of the decedent or protected person, whether arising in contract, in tort, or otherwise, and liabilities of the estate which arise at or after the death of the decedent or after the appointment of a conservator, including funeral expenses and expenses of administration. "Claims" does not include estate or inheritance taxes, or demands or disputes regarding title of a decedent or protected person to specific assets alleged to be included in the estate.

(7) "Conservator" means a person who is appointed by a court to manage the estate of a protected person.

(8) "Court" means any of the courts of record in this state having jurisdiction in matters relating to the affairs of decedents.

(9) "Descendant" of an individual means all of his descendants of all generations, with the relationship of parent and child at each generation being determined by the definition of child and parent contained in this title.

(10) "Devise," when used as a noun, means a testamentary disposition of real or personal property and, when used as a verb, means to dispose of real or personal property by will.

(11) "Devisee" means any person designated in a will to receive a devise. For the purposes of Title 75, Chapter 3, Probate of Wills and Administration, in the case of a devise to an existing trust or trustee, or to a trustee in trust described by will, the trust or trustee is the devisee,and the beneficiaries are not devisees.

(12) "Disability" means cause for a protective order as described by Section 75-5-401.

(13) "Distributee" means any person who has received property of a decedent from his personal representative other than as a creditor or purchaser. A testamentary trustee is a distributee only to the extent of distributed assets or increment thereto remaining in his hands. A beneficiary of a testamentary trust to whom the trustee has distributed property received from a personal representative is a distributee of the personal representative. For purposes of this provision, "testamentary trustee" includes a trustee to whom assets are transferred by will, to the extent of the devised assets.

(14) "Estate" includes the property of the decedent, trust, or other person whose

affairs are subject to this title as originally constituted and as it exists from time to time during administration.

(15) "Exempt property" means that property of a decedent's estate which is described in Section 75-2-403.

(16) "Fiduciary" includes a personal representative, guardian, conservator, and trustee.

(17) "Foreign personal representative" means a personal representative of another jurisdiction.

(18) "Formal proceedings" means proceedings conducted before a judge with notice to interested persons.

(19) "Governing instrument" means a deed, will, trust, insurance or annuity policy, account with POD designation, security registered in beneficiary form (TOD), pension, profit-sharing, retirement, or similar benefit plan, instrument creating or exercising a power of appointment or a power of attorney, or a dispositive, appointive, or nominative instrument of any similar type.

(20) "Guardian" means a person who has qualified as a guardian of a minor or incapacitated person pursuant to testamentary or court appointment, or by written instrument as provided in Section 75-5-202.5, but excludes one who is merely a guardian ad litem.

(21) "Heirs," except as controlled by Section 75-2-711, means persons, including the surviving spouse and state, who are entitled under the statutes of intestate succession to the property of a decedent.

(22) "Incapacitated person" means any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause, except minority, to the extent of lacking sufficient understanding or capacity to make or communicate responsible decisions.

(23) "Informal proceedings" mean those conducted without notice to interested persons by an officer of the court acting as a registrar for probate of a will or appointment of a personal representative.

(24) "Interested person" includes heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a property right in or claim against a trust estate or the estate of a decedent, ward, or protected person. It also includes persons having priority for appointment as personal representative, other fiduciaries representing interested persons, a settlor of a trust, if living, or the settlor's legal representative, if any, if the settlor is living but incapacitated. The meaning as it relates to particular persons may vary from time to time and shall be determined according to the particular purposes of, and matter involved in, any proceeding.

(25) "Issue" of a person means descendant as defined in Subsection (9).

(26) "Joint tenants with the right of survivorship" and "community property with

the right of survivorship" includes coowners of property held under circumstances that entitle one or more to the whole of the property on the death of the other or others, but excludes forms of coownership registration in which the underlying ownership of each party is in proportion to that party's contribution.

(27) "Lease" includes an oil, gas, or other mineral lease.

(28) "Letters" includes letters testamentary, letters of guardianship, letters of administration, and letters of conservatorship.

(29) "Minor" means a person who is under 18 years of age.

(30) "Mortgage" means any conveyance, agreement, or arrangement in which property is used as security.

(31) "Nonresident decedent" means a decedent who was domiciled in another jurisdiction at the time of his death.

(32) "Organization" includes a corporation, limited liability company, business trust, estate, trust, partnership, joint venture, association, government or governmental subdivision or agency, or any other legal or commercial entity.

(33) "Parent" includes any person entitled to take, or who would be entitled to take if the child died without a will, as a parent under this code by intestate succession from the child whose relationship is in question and excludes any person who is only a stepparent, foster parent, or grandparent.

(34) "Payor" means a trustee, insurer, business entity, employer, government, governmental agency or subdivision, or any other person authorized or obligated by law or a governing instrument to make payments.

(35) "Person" means an individual or an organization.

(36) (a) "Personal representative" includes executor, administrator, successor personal representative, special administrator, and persons who perform substantially the same function under the law governing their status.

(b) "General personal representative" excludes special administrator.

(37) "Petition" means a written request to the court for an order after notice.

(38) "Proceeding" includes action at law and suit in equity.

(39) "Property" includes both real and personal property or any interest therein and means anything that may be the subject of ownership.

(40) "Protected person" means a person for whom a conservator has been appointed. A "minor protected person" means a minor for whom a conservator has been appointed because of minority.

(41) "Protective proceeding" means a proceeding described in Section 75-5-401.

(42) "Registrar" refers to the official of the court designated to perform the functions of registrar as provided in Section 75-1-307.

(43) "Security" includes any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest, or participation in an oil, gas, or

mining title or lease or in payments out of production under such a title or lease, collateral trust certificate, transferable share, voting trust certificate, and, in general, any interest or instrument commonly known as a security, or any certificate of interest or participation, any temporary or interim certificate, receipt, or certificate of deposit for, or any warrant or right to subscribe to or purchase, any of the foregoing.

(44) "Settlement," in reference to a decedent's estate, includes the full process of administration, distribution, and closing.

(45) "Special administrator" means a personal representative as described in Sections 75-3-614 through 75-3-618.

(46) "State" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or insular possession subject to the jurisdiction of the United States, or a Native American tribe or band recognized by federal law or formally acknowledged by a state.

(47) "Successor personal representative" means a personal representative, other than a special administrator, who is appointed to succeed a previously appointed personal representative.

(48) "Successors" means persons, other than creditors, who are entitled to property of a decedent under the decedent's will or this title.

(49) "Supervised administration" refers to the proceedings described in Title 75, Chapter 3, Part 5, Supervised Administration.

(50) "Survive," except for purposes of Part 3 of Article VI, Uniform TOD Security Registration Act, means that an individual has neither predeceased an event, including the death of another individual, nor is considered to have predeceased an event under Section 75-2-104 or 75-2-702. The term includes its derivatives, such as "survives," "survived," "survivor," and "surviving."

(51) "Testacy proceeding" means a proceeding to establish a will or determine intestacy.

(52) "Testator" includes an individual of either sex.

(53) "Trust" includes a health savings account, as defined in Section 223, Internal Revenue Code, any express trust, private or charitable, with additions thereto, wherever and however created. The term also includes a trust created or determined by judgment or decree under which the trust is to be administered in the manner of an express trust. The term excludes other constructive trusts, and it excludes resulting trusts, conservatorships, personal representatives, trust accounts as defined in Title 75, Chapter 6, Nonprobate Transfers, custodial arrangements pursuant to any Uniform Transfers To Minors Act, business trusts providing for certificates to be issued to beneficiaries, common trust funds, voting trusts, preneed funeral plans under Title 58, Chapter 9, Funeral Services Licensing Act, security

arrangements, liquidation trusts, and trusts for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions, or employee benefits of any kind, and any arrangement under which a person is nominee or escrowee for another.

(54) "Trustee" includes an original, additional, and successor trustee, and cotrustee, whether or not appointed or confirmed by the court.

(55) "Ward" means a person for whom a guardian has been appointed. A "minor ward" is a minor for whom a guardian has been appointed solely because of minority.

(56) "Will" includes codicil and any testamentary instrument which merely appoints an executor, revokes or revises another will, nominates a guardian, or expressly excludes or limits the right of an individual or class to succeed to property of the decedent passing by intestate succession.

UCA §78-2-2(3)(j):

(1) The Supreme Court has original jurisdiction to answer questions of state law certified by a court of the United States.

(2) The Supreme Court has original jurisdiction to issue all extraordinary writs and authority to issue all writs and process necessary to carry into effect its orders, judgments, and decrees or in aid of its jurisdiction.

(3) The Supreme Court has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) a judgment of the Court of Appeals;

(b) cases certified to the Supreme Court by the Court of Appeals prior to final judgment by the Court of Appeals;

(c) discipline of lawyers;

(d) final orders of the Judicial Conduct Commission;

(e) final orders and decrees in formal adjudicative proceedings originating with:

(i) the Public Service Commission;

(ii) the State Tax Commission;

(iii) the School and Institutional Trust Lands Board of Trustees;

(iv) the Board of Oil, Gas, and Mining;

(v) the state engineer; or

(vi) the executive director of the Department of Natural Resources reviewing actions of the Division of Forestry, Fire and State Lands;

(f) final orders and decrees of the district court review of informal adjudicative proceedings of agencies under Subsection (3)(e);

(g) a final judgment or decree of any court of record holding a statute of the

United States or this state unconstitutional on its face under the Constitution of the United States or the Utah Constitution;

(h) interlocutory appeals from any court of record involving a charge of a first degree or capital felony;

(i) appeals from the district court involving a conviction or charge of a first degree felony or capital felony;

(j) orders, judgments, and decrees of any court of record over which the Court of Appeals does not have original appellate jurisdiction; and

(k) appeals from the district court of orders, judgments, or decrees ruling on legislative subpoenas.

(4) The Supreme Court may transfer to the Court of Appeals any of the matters over which the Supreme Court has original appellate jurisdiction, except:

(a) capital felony convictions or an appeal of an interlocutory order of a court of record involving a charge of a capital felony;

(b) election and voting contests;

(c) reapportionment of election districts;

(d) retention or removal of public officers;

(e) matters involving legislative subpoenas; and

(f) those matters described in Subsections (3)(a) through (d).

(5) The Supreme Court has sole discretion in granting or denying a petition for writ of certiorari for the review of a Court of Appeals adjudication, but the Supreme Court shall review those cases certified to it by the Court of Appeals under Subsection (3)(b).

(6) The Supreme Court shall comply with the requirements of Title 63G, Chapter 4, Administrative Procedures Act, in its review of agency adjudicative proceedings.

UCA §78-2a-3(2)(j):

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary:

(a) to carry into effect its judgments, orders, and decrees; or

(b) in aid of its jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, School and Institutional Trust Lands Board of Trustees, Division of Forestry, Fire and State Lands actions reviewed by the executive director of the

Department of Natural Resources, Board of Oil, Gas, and Mining, and the state engineer;

(b) appeals from the district court review of:

(i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies; and

(ii) a challenge to agency action under Section **63G-3-602**;

(c) appeals from the juvenile courts;

(d) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony;

(e) appeals from a court of record in criminal cases, except those involving a conviction or charge of a first degree felony or capital felony;

(f) appeals from orders on petitions for extraordinary writs sought by persons who are incarcerated or serving any other criminal sentence, except petitions constituting a challenge to a conviction of or the sentence for a first degree or capital felony;

(g) appeals from the orders on petitions for extraordinary writs challenging the decisions of the Board of Pardons and Parole except in cases involving a first degree or capital felony;

(h) appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, parent-time, visitation, adoption, and paternity;

(i) appeals from the Utah Military Court; and

(j) cases transferred to the Court of Appeals from the Supreme Court.

(3) The Court of Appeals upon its own motion only and by the vote of four judges of the court may certify to the Supreme Court for original appellate review and determination any matter over which the Court of Appeals has original appellate jurisdiction.

(4) The Court of Appeals shall comply with the requirements of Title 63G, Chapter 4, Administrative Procedures Act, in its review of agency adjudicative proceedings.

RULES:

Rule 7(f)(2) URCP:

Unless the court approves the proposed order submitted with an initial memorandum, or unless otherwise directed by the court, the prevailing party shall, within fifteen days after the court's decision, serve upon the other parties a

proposed order in conformity with the court's decision. Objections to the proposed order shall be filed within five days after service. The party preparing the order shall file the proposed order upon being served with an objection or upon expiration of the time to object.

Rule 59 URCP:

(a) Grounds. Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment:

(a)(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial.

(a)(2) Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by resort to a determination by chance or as a result of bribery, such misconduct may be proved by the affidavit of any one of the jurors.

(a)(3) Accident or surprise, which ordinary prudence could not have guarded against.

(a)(4) Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

(a)(5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.

(a)(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

(a)(7) Error in law.

(b) Time for motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) Affidavits; time for filing. When the application for a new trial is made under

Subdivision (a)(1), (2), (3), or (4), it shall be supported by affidavit. Whenever a motion for a new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits. The time within which the affidavits or opposing affidavits shall be served may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) On initiative of court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) Motion to alter or amend a judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Rule 60(b)(4) URCP:

Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), or (3),not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

VII
STATEMENT OF THE CASE

A
NATURE OF THE CASE

This is an appeal from the trial court's July 18, 2008 Memorandum Decision and Order denying Mr. Henshaw's Motion to Vacate that portion of the trial court's May 15, 2006 directed verdict holding that Raymond Watrous' interest in the water rights, that the Kings admit they sold to the Watrouses, that Mrs. Watrous thereafter sold to Barbara Henshaw, subsequent to Mr. Watrous' death, that Barbara Henshaw then sold to Dee Henshaw, did not pass to Dee Henshaw.

B
COURSE OF PROCEEDINGS AND DISPOSITION IN THE TRIAL COURT

On or about July 1992, Barbara Henshaw purchased certain real property, located in Wayne County, Utah from Mildred Watrous. In conjunction with the purchase of the property, Barbara Henshaw also purchased water rights to irrigate the property, which rights had previously been purchased by Mildred and Raymond Watrous from Jack and Bonnie King (hereinafter "the Kings"). The water deed given to the Watrouses by the Kings specified that the Kings were selling two hours of the full flow of Pine Creek every eighteen days. The language of the Water Deed was incorporated into the Warranty Deed given Mrs. Henshaw by Mildred Watrous

at the closing of the purchase of the property.

Dee Henshaw completed the purchase of the property from his mother Barbara Henshaw and recorded a deed to the property on August 14, 2003. However, prior to that time he had an unrecorded deed from Mrs. Henshaw conveying the referenced property.

From the time the Watrouses purchased the water rights, until approximately June 1, 2000, both the Watrouses and the Henshaws used the water as needed on a daily basis without any objection or complaint from the Kings about how much water was being used or how the water was being used. From the time the Henshaws purchased the property in 1992, through June 2000, the Kings never shut off the Henshaws' water.

Beginning on or about June 1, 2000, the Kings began interfering with the Henshaws' use of their water on a daily basis by shutting off the Henshaws' water. Additionally the Kings made calls to the Henshaws threatening to shut off the Henshaws' water, dig up their waterline and otherwise prevent the Henshaws' from using the water to irrigate their property.

Sometime shortly after June 28, 2000, without first telling the Henshaws, the Kings placed a ½ inch pipe and ½ inch gate valve on the 3-inch waterline. The 3-inch waterline was installed and paid for by the Watrouses, and it was sold to the Henshaws by Mildred Watrous. King installed the ½ inch pipe and the ½ inch gate

valve for the express purpose of preventing the Henshaws from being able to use the water to operate their hand lines and sprinklers to water their property. From the time the Kings installed the ½ inch pipe and gate valve on the 3-inch waterline, installed and paid for by the Watrouses and sold to the Henshaws, the Henshaws were denied access to the water they purchased from Mildred Watrous, who, along with her Husband Raymond, purchased the water rights from Jack and Bonnie King.

On July 14, 2000, Barbara Henshaw, Dee Henshaw and Dana Henshaw (hereinafter, "the Henshaws") filed suit against Jack King for: Breach of Contract, Tortuous Interference, Breach of Covenant of Good Faith and Fair Dealing, Theft or Conversion, Harassment, and Intentional Infliction of Emotional Distress. King filed an answer claiming that he never sold the Watrouses any water rights and a counterclaim to quiet title to the water that the Henshaws claim he sold to the Watrouses that the Watrouses then sold to them. In his answer, King also claimed that Mildred could only sell one half of the water that the Kings sold to her and her Husband because the Water Deed given to the Watrouses by the Kings did not specify that the water was sold to the Watrouses as joint tenants rather than as tenants in common.

The Henshaws filed an amended complaint adding Bonnie King as a defendant on August 23, 2003. The Kings filed an answer to the Henshaws' Amended Complaint on September 10, 2003, and on June 7, 2004, the Kings filed

an amended answer and counterclaim asserting the same defenses as Jack King did in his answer to the plaintiffs' initial Complaint and added a claim for "quiet title."

Both parties subsequently filed various motions and the case went to trial before Judge Lee on April 17, 2006. After the close of the plaintiffs' case, on April 19, 2005, the Kings moved for a motion for a directed verdict seeking a dismissal of Barbara Henshaw and Dana Henshaw as plaintiffs in the case.

Judge Lee dismissed Barbara Henshaw and Dana Henshaw as plaintiffs in the case and he dismissed Mr. Henshaw's claims for intentional interference with economic relations, intentional infliction of emotional distress, and conversion or theft. Judge Lee also granted the Kings' claim that at most Mr. Henshaw could only acquire one-half interest in the water sold to the Watrouses, by the Kings, because the Water Deed given the Watrouses by the Kings did not specify that it was a conveyance as joint tenants rather than tenants in common and there was no evidence that Mrs. Watrous acquired Mr. Watrous interest in the water upon his death.

Judge Lee then permitted the trial to go forward with Mr. Henshaw as the sole plaintiff and assert his claims that he had an easement to connect the 3-inch waterline to the Kings' 6-inch waterline and to use the 6-inch waterline to water his property, and that the Kings did in fact sell water rights to the Watrouses which rights were sold to Mrs. Henshaw and then to Mr. Henshaw. At conclusion of the

trial, the jury found that Mr. Henshaw was not entitled to use the water the Kings had sold to the Watrouses and conveyed to him by the Warranty Deeds from Mildred Watrous to Mrs. Henshaw and from Mrs. Henshaw to him because he failed to file the required forms with the State of Utah in order to permit him to use the water. However, the jury found that the Kings had in fact sold water rights to the Watrouses and that those water rights were transferred to Mr. Henshaw by the Warranty Deeds from Mildred Watrous to Barbara Henshaw and from Barbara Henshaw to him. Therefore, the jury ruled that the Kings were not entitled to have the water rights quieted in themselves.

The Kings prepared an Order on Motions for Directed Verdict and sent a copy of the proposed order to Mr. Henshaw's counsel on or about May 4, 2006. Mr. Henshaw's counsel objected to the proposed order on motions for directed verdict on May 15, 2006. However, that objection was not entered until May 18, 2006. However, the Kings admit that the Objection was served on them on May 15, 2006. The Kings' counsel responded to Mr. Henshaw's objection to the proposed order on motions for directed verdict on or about May 22, 2006.

The Court issued a memorandum decision on Mr. Henshaw's objection to the proposed order on motions for directed verdict on June 19, 2006. In the Court's Memorandum Decision, the Court stated that it had signed and entered the proposed order on motions for directed verdict on May 15, 2006. This was the first time

either Mr. Henshaw or his counsel learned that the Court had signed and entered the proposed order on motions for directed verdict. Neither the Kings nor their counsel ever sent Mr. Henshaw or his counsel a "Notice of Judgment" on the proposed order on motions for directed verdict as required by Rule 58A(d) URCP.

Upon learning that the Court had signed and entered the proposed order on motions for directed verdict on May 15, 2006, Mr. Henshaw filed a Motion to Alter or Amend under Rule 59 URCP, claiming that the Court had improperly signed and entered the proposed order on motions for directed verdict because the time for him to file an objection to the proposed order on motions for directed verdict had not yet expired. This Motion was filed on July 27, 2006.

On September 13, 2006, the Court denied Mr. Henshaw's Motion to Alter or Amend based on its conclusions that the provisions of Rule 7(f)(2) URCP are not binding on district courts, and that under the provisions of Rules 59, it could not extend the time to file a motion to alter or amend a judgment or order.

On September 28, 2006, Mr. Henshaw then filed a Motion For Relief Under Rule 60(b), asking the Court to set aside the Order on Motions for Directed Verdict, claiming that the Kings deliberately failed to notify him that the Order on Motions for Directed Verdict had been entered and responded to his Objection to the proposed Order on Motions for Directed Verdict in order to prevent him from learning that the Order on Motions for Directed Verdict had been entered in time to

file an appeal from the Order on Motions for Directed Verdict.

On November 15, 2006, the Court entered a Memorandum Decision denying Mr. Henshaw's Motion for Relief Under Rule 60 (b) holding that Mr. Henshaw was not sufficiently diligent in determining if the Order on Motions for Directed Verdict had in fact been signed and entered and that the provisions of Rule 7(f)(2) URCP are not binding on district courts.

Mr. Henshaw filed a Notice of Appeal on December 16, 2006, and that appeal was assigned case No. 20061175-CA. On November 23, 2007, the Court of Appeals entered a memorandum decision stating that it did not have jurisdiction to consider Mr. Henshaw's argument that the trial court erred in ruling that Raymond Watrous' interest in the water rights, the Kings sold to the Watrouses, did not pass to Mildred Watrous upon Raymond's death and ultimately pass to Mr. Henshaw. However, the Court of Appeals did not address or rule on Mr. Henshaw's assertion that the Kings did not have standing to assert that Raymond Watrous' interest in the water rights did not pass to Mildred Watrous upon Raymond's death or that the trial court did not have jurisdiction to rule upon the Kings' assertion that Raymonds' interest in the water rights did not pass to Mildred Watrous upon Raymond's death, because the Kings lacked standing to even assert that Raymonds' interest in the water rights did not pass to Mildred Watrous upon Raymond's death.

After the Court of Appeals issued its remittitur in case No. 20061175-CA,

Mr. Henshaw file a Motion to Vacate that portion of the trial court's directed verdict holding that Raymond Watrous' interest in the water rights did not pass to Mildred Watrous upon Raymond's death and ultimately pass to Mr. Henshaw.

On July 18, 2008, the trial court issued a memorandum decision and order denying Mr. Henshaw's Motion to Vacate, stating that Mr. Henshaw's Motion to Vacate was not timely. However, the trial court, for the third time, refused to address Mr. Henshaw's assertion that the Kings do not have standing to assert that Raymond Watrous' interest in the water rights did not pass to Mildred Watrous upon Raymond's death and ultimately pass to Mr. Henshaw. The trial court also refused to address Mr. Henshaw's assertion that the trial court does not have jurisdiction to even consider the Kings assertion that Raymonds' interest in the water rights did not pass to Mildred upon Raymond's death and ultimately pass to Mr. Henshaw, because the Kings do not have standing to even assert that Raymonds' interest in the water rights did not pass to Mildred Watrous upon Raymond's death and ultimately pass to Mr. Henshaw.

Mr. Henshaw then filed his Notice of Appeal from the trial court's denial of his Motion to Vacate on August 15, 2008. On September 23, 2008, the Utah Supreme Court assigned this case to this Court.

C
STATEMENT OF FACTS

1. On or about July 1992, Barbara Henshaw purchased certain real property, located in Wayne County, Utah from Mildred Watrous. (Record 1-16, 467-481, 738-755, 789-821).

2. In conjunction with said purchase of real property, Barbara Henshaw also purchased water rights to irrigate the referenced property, which rights had previously been purchased by Mildred and Raymond Watrous from Jack and Bonnie King. (Record 1-16, 467-481, 738-755, 789-821).

3. The water deed given to the Watrouses by the Kings specified that the Kings were selling two hours of the full flow of Pine Creek every eighteen days. (Record 1-16, 467-481, 738-755, 789-821).

4. The language of the Water Deed was incorporated into the Warranty Deed given Barbara Henshaw by Mildred Watrous at the closing of the purchase of the property. (Record 1-16, 467-481, 738-755, 789-821).

5. Dee Henshaw completed the purchase of the property from his mother Barbara Henshaw and recorded a deed to the property on August 14, 2003. However, prior to that time he had an unrecorded deed from Barbara Henshaw conveying the referenced property. (Record 1-16, 467-481, 738-755, 789-821).

6. From the time the Watrouses purchased the water rights, until

approximately June 1, 2000, both the Watrouses and the Henshaws used the water as needed on a daily basis without any objection or complaint from the Kings about how much water was being used or how the water was being used. (Record 1-16, 467-481, 738-755, 789-821).

7. From the time the Henshaws purchased the property in 1992, through June 2000, the Kings never shut off the Henshaws' water. (Record 1-16, 467-481, 738-755, 789-821).

8. Beginning on or about June 1, 2000, the Kings began interfering with the Henshaws' use of their water on a daily basis by shutting off the Henshaws' water. (Record 1-16, 467-481, 738-755, 789-821).

9. Additionally the Kings made calls to the Henshaws threatening to shut off the Henshaws' water, dig up their waterline and otherwise prevent the Henshaws from using the water to irrigate their property. (Record 1-16, 467-481, 738-755, 789-821).

10. Sometime shortly after June 28, 2000, without first telling the Henshaws, the Kings placed a ½ inch pipe and ½ inch gate valve on the 3-inch waterline. The 3-inch waterline was installed and paid for by the Watrouses, and it was sold to the Henshaws by Mildred Watrous. King installed the ½ inch pipe and the ½ inch gate valve for the express purpose of preventing the Henshaws from being able to use the water to operate their hand lines and sprinklers to water their property. (Record 1-

16, 467-481, 738-755, 789-821).

11. From the time the Kings installed the ½ inch pipe and gate valve on the 3-inch waterline, installed and paid for by the Watrouses and sold to the Henshaws, the Henshaws were denied access to the water they purchased from Mildred Watrous, who, along with her Husband Raymond, purchased the water rights from Jack and Bonnie King. (Record 1-16, 467-481, 738-755, 789-821).

12. On July 14, 2000, Mrs. Henshaw, Dee Henshaw and Dana Henshaw filed suit against Jack King for: Breach of Contract, Tortuous Interference, Breach of Covenant of Good Faith and Fair Dealing, Theft or Conversion, Harassment, and Intentional Infliction of Emotional Distress. (Record at 1-16).

13. King filed an answer claiming that he never sold the Watrouses any water rights and counterclaim to quiet title to the water that the Henshaws claim he sold to the Watrouses that the Watrouses then sold to them. (Record at 24-31).

14. In his answer, King also claimed that Mildred could only sell one half of the water that the Kings sold to her and her Husband because the Water Deed given to the Watrouses by the Kings did not specify that the water was sold to the Watrouses as joint tenants rather than as tenants in common. (Record at 24-31).

15. The Plaintiff filed an amended complaint adding Bonnie King as a defendant on August 22, 2003. (Record at 467-481).

16. The Kings filed an answer to the plaintiffs' Amended Complaint on

September 10, 2003. (Record at 486-494).

17. On June 7, 2004, the Kings filed an amended answer and counterclaim asserting the same defenses as Jack King did in his answer to the plaintiffs' initial Complaint and added a claim for "quiet title." (Record at 646-655).

18. Both parties subsequently filed various motions and the case went to trial before Judge Lee on April 17, 2006. (Record at 656-1010).

19. After the close of the plaintiffs' case, on April 19, 2005, the Kings moved for a motion for a directed verdict seeking a dismissal of Barbara Henshaw and Dana Henshaw as plaintiffs in the case. (Record at 1068-1071).

20. Judge Lee dismissed Barbara Henshaw and Dana Henshaw as plaintiffs in the case and he dismissed Mr. Henshaw's claims for intentional interference with economic relations, intentional infliction of emotional distress, and conversion or theft. (Record at 1068-1070).

21. Judge Lee also granted the Kings' claim that at most Mr. Henshaw could only acquire one-half interest in the water sold to the Watrouses, by the Kings, because the Water Deed given the Watrouses by the Kings did not specify that it was a conveyance as joint tenants rather than tenants in common and there was no evidence that Mrs. Watrous acquired Mr. Watrous interest in the water upon his death. (Record at 1068-1070).

22. Judge Lee then permitted the trial to go forward with Mr. Henshaw as

the sole plaintiff and assert his claims that he had an easement to connect the 3-inch waterline to the Kings' 6-inch waterline and to use the 6-inch waterline to water his property, and that the Kings did in fact sell water rights to the Watrouses which rights were sold to Mrs. Henshaw and then to Mr. Henshaw. (Record at 1070-1071).

23. At conclusion of the trial the jury found that Mr. Henshaw was not entitled to use the water the Kings had sold to the Watrouses and conveyed to him by the Warranty Deeds from Mildred Watrous to Mrs. Henshaw and from Mrs. Henshaw to him. (Record at 1073-1074).

24. However, the jury found that Kings had in fact sold water rights to the Watrouses and that those water rights were transferred to Mr. Henshaw by the Warranty Deeds from Mildred Watrous to Mrs. Henshaw and from Mrs. Henshaw to him and ruled that the Kings were not entitled to have the water rights quieted in themselves. (Record at 1073-1074).

25. The Kings prepared an Order on Motions for Directed Verdict and sent a copy of the proposed order to Mr. Henshaw's counsel on or about May 4, 2006. (Record at 1074).

26. Mr. Henshaw's counsel objected to the proposed order on motions for directed verdict on May 15, 2006. However, that objection was not entered until May 18, 2006. Nonetheless, the Kings admit that the Objection was served on them

on May 15, 2006. (Record at 1079-1081).

27. The Kings' counsel responded to Mr. Henshaw's objection to the proposed order on motions for directed verdict on or about May 22, 2006. (Record at 1091-1110).

28. The Court issued a memorandum decision on Mr. Henshaw's objection to the proposed order on motions for directed verdict on June 19, 2006. (Record at 1125-1128).

29. In the Court's Memorandum Decision, the Court stated that it had signed and entered the proposed order on motions for directed verdict on May 15, 2006. (Record at 1125-1128).

30. This was the first time either Mr. Henshaw or his counsel learned that the Court had signed and entered the proposed order on motions for directed verdict. (Record at 1139-1143).

31. Neither the Kings nor their counsel ever sent Mr. Henshaw or his counsel a "Notice of Judgment" on the proposed order on motions for directed verdict as required by Rule 58A(d) URCP. (Record at 1072-1456).

32. Upon learning that the Court had signed and entered the proposed order on motions for directed verdict on May 15, 2006, Mr. Henshaw filed a Motion to Alter or Amend under Rule 59 URCP, claiming that the Court had improperly signed and entered the proposed order on motions for directed verdict because the

time for him to file an objection to the proposed order on motions for directed verdict had not yet expired. This Motion was filed on July 27, 2006. (Record at 1139-1143).

33. On September 13, 2006, the Court denied Mr. Henshaw's Motion to Alter or Amend based on its conclusions that the provisions of Rule 7(f)(2) URCP are not binding on district courts, and that under the provisions of Rules 59, it could not extend the time to file a motion to alter or amend a judgment or order. (Record at 1171-1172).

34. On September 28, 2006, Mr. Henshaw then filed a Motion For Relief Under Rule 60(b), asking the Court to set aside the Order on Motions for Directed Verdict, claiming that the Kings deliberately failed to notify him that the Order on Motions for Directed Verdict had been entered and responded to his Objection to the Proposed Order on Motions for Directed Verdict in order to prevent him from learning that the Order on Motions for Directed Verdict had been entered in time to file an appeal from the Order on Motions for Directed Verdict. (Record at 1175-1176).

35. On November 15, 2006, the Court entered a Memorandum Decision denying Mr. Henshaw's Motion for Relief Under Rule 60(b) holding that Mr. Henshaw was not sufficiently diligent in determining if the Order on Motions for Directed Verdict had in fact been signed and entered and that the provisions of Rule

7(f)(2) URCP are not binding on district courts. (Record at 1209-1213).

36. Mr. Henshaw filed a Notice of Appeal on December 16, 2006, and that appeal was assigned case No. 20061175-CA. (Record at 1215-1216).

37. On November 23, 2007, the Court of Appeals entered a memorandum decision stating that it did not have jurisdiction to consider Mr. Henshaw's argument that the trial court erred in ruling that Raymond Watrous' interest in the water rights, the Kings sold to the Watrouses, did not pass to Mildred Watrous upon Raymond's death and ultimately pass to Mr. Henshaw. However, the Court of Appeals did not address or rule on Mr. Henshaw's assertion that the Kings did not have standing to even assert that Raymond's interest in the water rights did not pass to Mildred Watrous upon Raymond's death or that the trial court did not have jurisdiction to even rule upon the Kings assertion that Raymond's interest in the water rights did not pass to Mildred Watrous upon Raymond's death, because the Kings lacked standing to even assert that Raymond's interest in the water rights did not pass to Mildred Watrous upon Raymond's death. (Record at 1248-1258).

38. After the Court of Appeals issued its remittitur in case No. 20061175-CA, Mr. Henshaw file a motion to vacate that portion of the trial court's directed verdict holding that Raymond Watrous' interest in the water rights, the Kings admit they sold to the Watrouses, did not pass to Mildred Watrous upon Raymond's death and ultimately pass to Mr. Henshaw. (Record at 1259-1260).

39. On July 18, 2008, the trial court issued a memorandum decision and order denying Mr. Henshaw's Motion to Vacate, stating that Mr. Henshaw's Motion to Vacate was not timely. However, the trial court, for the third time, refused to address Mr. Henshaw's assertion that the Kings do not have standing to assert that Raymond Watrous' interest in the water rights did not pass to Mildred Watrous upon Raymond's death and ultimately pass to Mr. Henshaw. The trial court also refused to address Mr. Henshaw's assertion that the trial court does not even have jurisdiction to even consider the Kings assertion that Raymonds' interest in the water did not pass to Mildred Watrous upon Raymond's death and ultimately pass to Mr. Henshaw, because the Kings do not have standing to even assert that Raymonds' interest in the water rights did not pass to Mildred Watrous upon Raymond's death and ultimately pass to Mr. Henshaw. (Record at 1391-1393).

40. Mr. Henshaw filed his Notice of Appeal with the Utah Supreme Court from the trial court's denial of his Motion to Vacate on August 15, 2008. (Record at 1438).

41. The Utah Supreme Court transferred the appeal to this Court on September 23, 2008. (Record at Volume 6, left side, third page).

VIII
SUMMARY OF ARGUMENT

The trial court committed prejudicial and reversible error when it granted the Kings' motion for a directed verdict, claiming that only one-half of the water rights they sold to the Watrouses passed to Mildred Watrous upon Raymond Watrous' death. The trial court also committed prejudicial and reversible error, and abused its discretion, when it failed to set aside that portion of its directed verdict holding that only one-half of the water rights they sold to the Watrouses passed to Mildred Watrous upon Raymond Watrous' death.

IX
ARGUMENT

THE TRIAL COURT COMMITTED PREJUDICIAL AND REVERSIBLE ERROR WHEN IT DENIED MR. HENSHAW'S MOTION FOR RELIEF PURSUANT TO RULE 60(B)(4) URCP AND WHEN IT DENIED MR. HENSHAW'S MOTION TO VACATE THAT PORTION OF THE TRIAL COURT'S MAY 15, 2006 DIRECTED VERDICT, HOLDING THAT RAYMOND WATROUS' INTEREST IN THE WATER RIGHTS THAT THE KINGS ADMIT THEY SOLD TO THE WATROUSES, WHICH MRS. WATROUS THEREAFTER SOLD TO BARBARA HENSHAW AND BARBARA HENSHAW THEN SOLD TO DEE HENSHAW, DID NOT PASS TO DEE HENSHAW, BECAUSE THE KINGS LACKED STANDING TO EVEN ASSERT THAT RAYMOND WATROUS' INTEREST IN THE WATER RIGHTS DID NOT PASS TO MILDRED WATROUS UPON RAYMOND WATROUS'S DEATH AND ULTIMATELY TO MR. HENSHAW.

POINT I

THE TRIAL COURT ERRED AS A MATTER OF LAW IN DENYING MR. HENSHAW'S MOTION TO VACATE THAT PORTION OF THE TRIAL COURT'S MAY 15, 2006 DIRECTED VERDICT, HOLDING THAT RAYMOND WATROUS' INTEREST IN THE WATER RIGHTS THAT THE KINGS ADMIT THEY SOLD TO THE WATROUSES, WHICH MRS. WATROUS THEREAFTER SOLD TO BARBARA HENSHAW AND BARBARA HENSHAW THEN SOLD TO DEE HENSHAW, DID NOT PASS TO DEE HENSHAW, BECAUSE THE KINGS LACKED STANDING TO EVEN ASSERT THAT RAYMOND WATROUS' INTEREST IN THE WATER RIGHTS DID NOT PASS TO MILDRED WATROUS UPON RAYMOND WATROUS'S DEATH AND ULTIMATELY TO MR. HENSHAW.

A. MARSHALING OF FACTS:

The trial court made no factual findings to support its ruling that Raymond Watrous' interest in, or ownership of, the water rights the Kings sold to the Watrouses did not pass to Mildred Watrous upon Raymond Watrous' death. In his Motion to Alter or Amend, Mr. Henshaw specifically asked the trial court to enter factual findings so the appeals courts could understand how the trial court determined that the Kings had standing to assert that Raymond Watrous' interest in, or ownership of, the water rights the Kings sold to the Watrouses did not pass to Mildred Watrous upon Raymond Watrous' death. (Record 1137, 1162). However, the trial court failed to do so. The trial court also failed to specify how the Kings had standing to even assert that Raymond Watrous' interest in, or ownership of, the water rights the Kings sold to the Watrouses did not pass to Mildred Watrous upon Raymond Watrous' death, when it ruled on Mr. Henshaw's Rule 60(b) Motion.

(Record 1209-1214). The trial court also failed to specify how the Kings had standing to assert that Raymond Watrous' interest in, or ownership of, the water rights the Kings sold to the Watrouses did not pass to Mildred Watrous upon Raymond Watrous' death, when it ruled on Mr. Henshaw's Motion to Vacate. (Record 1154-1156). Therefore, there are no facts for Mr. Henshaw to martial to support the trial court's ruling that Raymond Watrous' interest in, or ownership of, the water rights the Kings sold to the Watrouses did not pass to Mildred Watrous upon Raymond Watrous' death. (Record 1391-1394).

B. THE TRIAL COURT ERRED AS A MATTER OF LAW IN DENYING MR. HENSHAW'S MOTION TO VACATE THAT PORTION OF THE TRIAL COURT'S MAY 15, 2006 DIRECTED VERDICT, HOLDING THAT RAYMOND WATROUS' INTEREST IN THE WATER RIGHTS THAT THE KINGS ADMIT THEY SOLD TO THE WATROUSES, WHICH MRS. WATROUS THEREAFTER SOLD TO BARBARA HENSHAW AND BARBARA HENSHAW THEN SOLD TO DEE HENSHAW, DID NOT PASS TO DEE HENSHAW, BECAUSE THE KINGS LACKED STANDING TO EVEN ASSERT THAT RAYMOND WATROUS' INTEREST IN THE WATER RIGHTS DID NOT PASS TO MILDRED WATROUS UPON RAYMOND WATROUS'S DEATH AND ULTIMATELY TO MR. HENSHAW.

1. Standing Is Jurisdictional:

In Jenkins v. Swan, 675 P.2d 1145 (Utah 1983), the Utah Supreme Court stated: *"the moving party must have standing to invoke the jurisdiction of the court."*

> *¶9 Standing is a jurisdictional requirement that must exist before a court may entertain a controversy. See Jones v. Barlow, 2007 UT 20, ¶12, 154 P.3d 808. Without the jurisdictional requirement of standing, a court has no*

authority to act. See, e.g., Utah Chapter of the Sierra Club v. Utah Air Quality Bd., 2006 UT 74, ¶17, 148 P.3d 960 ("Utah standing law 'operates as gatekeeper to the courthouse, allowing in only those cases that are fit for judicial resolution.'" (quoting Terracor v. Utah Bd. of State Lands & Forestry, 716 P.2d 796, 798-99 (Utah 1986))). (Emphasis added).

2007 P.3d (2007 UT App 154); Gedo v. Rose; 2007 UT App 154.

2. The Kings Have Not, And Cannot, Establish That They Ever Had Standing, To Assert That Raymond Watrous' Interest In The Water Sold To Watrouses Did Not Pass To Mildred Watrous At The Time Of Raymonds' Death.

"Anyone bringing an original proceeding---a dispute that is being presented to the courts for the first time---must satisfy the traditional standing test." Jenkins v. Swan, 675 P.2d at 1148, 1151 (Utah 1983).

Our generally stated standing rule is that a plaintiff must have suffered "some distinct and palpable injury that gives him [or her] a personal stake in the outcome of the legal dispute."(fn3) Jenkins v. Swan, 675 P.2d 1145, 1148 (Utah 1983); accord Utah Restaurant Association v. Davis County Board of Health, 709 P.2d at 1162; Kennecott Corp. v. Salt Lake County, 702 P.2d 451, 454 (Utah 1985); see Baird v. State, 574 P.2d 713 (Utah 1978). The need for such a personal stake frequently is described as a requirement that the plaintiff's injury be "particularized." The traditional standing requirement is generally justified on grounds that in the absence of a requirement that a plaintiff have a "personal stake in the outcome" or a "particularized injury," the courts might permit themselves to be drawn into disputes that are not fit for judicial resolution or amount to "generalized grievances that are more appropriately directed to the legislative and executive branches of the state government." Jenkins v. Swan, 675 P.2d at 1149; see Terracor v. Utah Board of State Lands & Forestry, 716 P.2d at 798-99; Baird v. State, 574 P.2d 713, 717 (Utah 1978).(fn4) (Emphasis added).

Society of Professional Journalists, Utah Chapter v. Vullock, 743 P.2d 1166 (Utah 1987).

> *As a general proposition the right to commence a legal proceeding depends on the plaintiffs' suffering an injury to a legally protected right for which the law provides a remedy. Absent such a showing, there is no right to complain in the courts.(fn2)*

Stromquist v. Cokayne, 646 P.2d 746 (Utah 1982), citing Jenkins v. State, Utah, 585 P.2d 442 (1978).

> *One aspect of general standing doctrine we share with the federal courts is the basic requirement that the complainant show "'some distinct and palpable injury that gives him [or her] a personal stake in the outcome of the legal dispute.'"*

Provo City Corp. v. Willden, 768 P.2d 455 (Utah 1989).

> *Utah law requires that the parties to a lawsuit have a sufficient interest in the subject matter of the dispute in order to confer standing upon them. See Terracor v. Utah Bd. of State Lands & Forestry, 716 P.2d 796, 798 (Utah 1986). Either party, or the court on its own motion, may properly raise the issue of standing for the first time on appeal. Blodgett v. Zions First Nat'l Bank, 752 P.2d 901, 904 (Utah Ct.App. 1988).* (Emphasis added).

Wade v. Burke, 800 P.2d 1106 (Ut. App. 1990).

In Haymond v. Bonneville Billing & Collections 89 P.3d 171 (Utah 2004), the Utah Supreme Court again discussed the applicable standards for standing in Utah. In Bonneville, the Supreme Court specifically held that:

> *As a general rule, a person can sustain a cause of action only where he has sustained some injury to his legal personal or property rights, the injury and the cause of action being contemporaneous." 1A C.J.S.*

Actions § 32a (1985); Jenkins v. Swan, 675 P.2d 1145, 1148 (Utah 1983). (Emphasis added).

> *A plaintiff who has not been granted standing to sue by statute must either show that he has or would suffer a "distinct and palpable injury that gives rise to a personal stake in the outcome" of the case or meet one of the two exceptions to standing recognized in cases involving "important public issues." Wash. County Water Conservancy Dist. v. Morgan, 2003 UT 58, ¶ 17, 82 P.3d 1125.*

2006 P.3d (2006 UT 36); In the Matter of E.H. ¶49.; 2006 UT 36.

> *In general, standing is available only to a person who has sustained some injury to her legal, personal, or property rights. Jenkins v. Swan, 675 P.2d 1145, 1148 (Utah 1983).*

¶50, id.

In this case, the Kings have not, and cannot, show that they have standing to assert that Raymond Watrous' interest in the water they sold to the Watrouses did not pass to Mildred Watrous at the time of Raymond's death.

In order for the Kings to assert that they have standing to claim the Raymond Watrous' interest in the water they sold to Watrouses did not passed to Mildred at the time the Raymond's death, the Kings would have to show that they are an *"interested persons,"* that they are heirs of Raymond Watrous, that they are children of Raymond Watrous, that they are devisees of Raymond Watrous, that they are creditors of Raymond Watrous, or that they are others having a property right in or claim against the estate of Raymond Watrous' estate, as defined in UCA §75-1-201.

> *"Interested persons" includes heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a property right in or claim against the estate of a decedent which may be affected by the proceedings. U.C.A., 1953, § 75--1--201(20) (1978 ed.).*

> *When a statute creates a cause of action and designates those who may sue under it, none except those designated may sue.* Berry Properties v. City of Commerce City, Colo.App., *667 P.2d 247 (1983).* (Emphasis added).

In Re: Estate of Peterson, 716 P.2d 801 (Utah 1986).

The present version of the Utah Probate Code specifies as follows:

> *"Interested person" includes heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a property right in or claim against a trust estate or the estate of a decedent, ward, or protected person. It also includes persons having priority for appointment as personal representative, other fiduciaries representing interested persons, a settlor of a trust, if living, or the settlor's legal representative, if any, if the settlor is living but incapacitated. The meaning as it relates to particular persons may vary from time to time and shall be determined according to the particular purposes of, and matter involved in, any proceeding.* UCA § 75-1-201.

In the instant matter, it is undisputed that the Kings cannot satisfy the requirements of the Utah probate code to show that they are "interested persons" as mandated in the Utah Probate Code in order to file a claim against the estate of Raymond Watrous. The Kings have not claimed, and cannot claim, that they all are *"heirs, devisees, children, spouses, creditors, beneficiaries"* of Raymond Watrous, or that they are "*others having a property right in or claim against a trust estate or the estate of"* of Raymond Watrous. Therefore, the Kings cannot, and have not, established that they have standing, or would have had standing, to assert that Raymond Watrous' interest in the water they sold to the Watrouses did not pass to Mildred Watrous at Raymond's death, in any probate proceeding.

Because, as a matter of law, the Kings do not, and did not, have standing to assert that Raymond Watrous' interest in the water they sold to the Watrouses did not pass to Mildred Watrous at Raymond's death, in any probate proceeding, they cannot establish that they have any right to assert in a collateral proceeding that Raymond Watrous' interest in the water they sold to the Watrouses did not pass to Mildred Watrous at Raymond's death. The Kings cannot obtain more legal rights in a collateral proceeding than they would have in a direct probate proceeding. Therefore, the Kings have no standing to assert in this proceeding that the water they sold to the Watrouses did not pass to Mildred Watrous at Raymond's death.

Because the Kings do not have standing to assert, in this proceeding, that the

water they sold to the Watrouses did not pass to Mildred Watrous at Raymond's death, this court's Order on Motions for the point in Directed Verdict ruling that Mr. Henshaw did not acquire any right, title or interest in the water sold by the Kings to Watrouses is void as a matter of law, and must be vacated.

3. Because The Kings Never Had Standing, And Do Not Have Standing, To Assert That Raymond Watrous' Interest In The Water Rights Sold To Watrouses Did Not Pass To Mildred Watrous At The Time Of Raymond Watrouses Death, This Court Never Had Jurisdiction To Hear Or Rule On The Kings Claim That Raymond Watrous' Interest In The Water Rights Sold To Watrouses Did Not Pass To Mildred Watrous The Time Of Raymond's Death.

As previously established in this Brief, standing is jurisdictional. Jenkins v. Swan and Gedo v. Rose, supra. Because the Kings have not established, and cannot, establish, that they have standing to assert that Raymond Watrous' interest in the water rights, sold to the Watrous by the Kings, did not pass to Mildred Watrouses upon Raymond death, that portion of this court's Order on Motions for Directed Verdict ruling that Mr. Henshaw did not acquire any right, title or interest in the water sold by the Kings to Watrouses is void as a matter of law, and must be vacated.

Any order entered by a court, without proper jurisdiction, is void as a matter of law. *"[T]he moving party must have standing to invoke the jurisdiction of the court."* Jenkins v. Swan, supra.

> *Standing is a jurisdictional requirement that must exist before a court may entertain a controversy. See Jones v. Barlow, 2007 UT 20, ¶12, 154 P.3d 808. Without the jurisdictional requirement of standing, a court has no authority to act.* (Emphasis added).

Gedo v. Rose, supra.

Because the Kings do not have standing to even assert that Raymond Watrous' interest in the water rights the Kings sold to him and Mildred Watrous did not pass to Mildred at the time of Raymond's death, the trial court never had jurisdiction to even hear or rule on the Kings claim that Raymond's interest in the

water rights did not pass to Mildred at the time of Raymond's death. Because the trial court never had jurisdiction to hear or rule on the Kings claim that Raymond's interest in the water rights did not pass to Mildred at the time of Raymond's death, the trial court committed plain, prejudicial and reversible error when it denied Mr. Henshaw's Motion to Vacate that portion of the trial court's directed verdict holding that Raymonds' interest in the water rights did not pass to Mildred at the time of Raymond's death, is void as a matter of law. Therefore, this Court must reverse that portion of the trial court's directed verdict holding that Raymonds' interest in the water rights did not pass to Mildred at the time of Raymond's death and remand this case back to the trial court directing it to vacate the portion of its directed verdict holding that Raymonds' interest in the water rights did not pass to Mildred at the time of Raymond's death.

POINT II
THE TRIAL COURT ABUSED ITS DISCRETION AND COMMITTED PREJUDICIAL AND REVERSIBLE ERROR WHEN IT DENIED MR. HENSHAW'S RULE 60b MOTION.

A. MARSHALING OF FACTS: The trial court made no factual findings in denying Mr. Henshaw's Rule 60(b) Motion to Vacate. Therefore, there are no facts for Mr. Henshaw to martial to support the trial court's ruling that Raymond Watrous' interest in, or ownership of, the water rights the Kings sold to the Watrouses did not pass to Mildred Watrous upon Raymond Watrous' death. (Record 1391-1394).

B. THE TRIAL COURT ABUSED ITS DISCRETION AND COMMITTED PREJUDICIAL AND REVERSIBLE ERROR WHEN IT DENIED MR. HENSHAW'S RULE 60B MOTION TO VACATE.

In its July 8, 2008 Memorandum Decision, the trial court states:

> *The plaintiffs' Motion to vacate is based on Rule 60(b)(4) of the Utah Rules of Civil Procedure. The Motion seeks a ruling voiding a portion of the directed verdict entered on 15 May 2006 against the plaintiffs. The basis advanced in support of this Motion is that the defendants did not have*

standing to argue that the water right in this case did not pass from Raymond Watrous to his wife.

A motion under Rule 60(b(4) must be filed within a reasonable time. In this case the plaintiffs' current Motion was filed approximately 21 months after entry of the directed verdict, after decision on other post-trial motions, and following an appeal. The Court concludes the Motion is simply not timely because it was not filed within a reasonable time.

There can be no legitimate claim that standing is a new issue. Both parties agree that the plaintiff argued standing at the time of trial. The plaintiffs also raised standing in their Motion to Alter or Amend, filed June 23, 2006. The issue was raised again in the plaintiffs' appellate brief filed some time in December 2006. However, the plaintiffs waited until 6 February 2008 to bring this Motion to Vacate based on lack of standing.

The Court finds the plaintiffs' delay in raising this issue is unreasonable. Thus the plaintiffs' Motion should be denied as untimely. (Record at 1393).

The trial court's ruling that Mr. Henshaw's Motion to Vacate was not timely is a misrepresentation of Rule 60(b)(4) URCP and the case law interpreting it. It is prejudicial and reversible error for the trial court to even assert that there is a time limit for vacating a void judgment.

Mr. Henshaw's Motion to Vacate is based on the undeniable fact that the trial court never had jurisdiction to hear or rule on the Kings' claim that Raymond Watrous's interest in the water rights, the Kings sold to Raymond and Mildred Watrous, did not pass to Mildred upon Raymond's death. That lack of jurisdiction makes that portion of the trial court's directed verdict, holding that the Raymond Watrous's interest in the water rights Jack and Bonnie King sold to Raymond and Mildred Watrous did not pass to Mildred upon Raymond's death, void as a matter of law, and a void judgment can never become a valid judgment through the passage of time.

In State v. Valdez, 65 P.3d 1191(Ct. App. 2003), the Utah Court of Appeals stated: *"It is well-settled that subject matter jurisdiction may be raised at any time, by either party or the court. See State v. Perank, 858 P.2d 927, 930 (Utah 1992)."*

Standing, of course, is an issue that is never waived and can be raised by any party or by the court at any time. See Terracor, 716 P.2d at 798; Stromquist, 646 P.2d at 747; Wade v. Burke, 800 P.2d 1106, 1108 (Utah

Ct.App.1990); Blodgett v. Zions First Nat'l Bank, 752 P.2d 901, 904 (Utah Ct.App.1988).

In re: Estate of Hunt, 842 P.2d 872 (Utah 1992).

In Garcia v. Garcia, 712 P.2d 288, 291 (Utah 1986), the Utah Supreme Court declared:

> *Either a judgment is void or it is valid. Determining which it is may well present a difficult question, but when that question is resolved, the court must act accordingly.*
>
> *By the same token, there is no time limit on an attack on a judgment as void. The one-year [three-month, in Utah] limit applicable to some Rule 60(b) motions is expressly inapplicable, and even the requirement that the motion be made within a "reasonable time," which seems literally to apply to motions under Rule 60(b)(4), cannot be enforced with regard to this class of motion. A void judgment cannot acquire validity because of laches on the part of the judgment debtor.* (Emphasis added).

Because there is no time limit for filing a challenge to the jurisdiction of a court, Mr. Henshaw's Motion to Vacate based on the trial court's lack of jurisdiction was timely and proper, and the trail court's assertion that Mr. Henshaw's Motion to Vacate was *"simply not timely because it was not filed within a reasonable time,"* is prejudicial and reversible error.

> *A lack of subject matter jurisdiction can be raised at any time and when subject matter jurisdiction does not exist, neither the parties nor the court can do anything to fill that void.*

Crump v. Crump, 821 P.2d 1172 (Ut. App. 1991), see also, 44 P.3d 724; Housing Authority of the City of Salt Lake v. Snyder; 2002 UT 28, 67 P.3d 1055; Fisher v. Fisher; 2003 UT App 91 and Curtis v. Curtis, 790 P.2d 717 (Ut. App. 1990).

Because the trial court based its ruling that Mr. Henshaw's Motion to Vacate, under Rule 60(b)(4) URCP, *"should be denied as untimely,"* for, as the trial court incorrectly concluded: *"A motion under Rule 60(b(4) must be filed within a reasonable time,"* without regard for clear and controlling Utah case law holding that:

> *[T]here is no time limit on an attack on a judgment as void. The one-year [three-month, in Utah] limit applicable to some Rule 60(b) motions is*

> *expressly inapplicable, and even the requirement that the motion be made within a "reasonable time," which seems literally to apply to motions under Rule 60(b)(4), cannot be enforced with regard to this class of motion.* Garcia v. Garcia, supra,

because standing is jurisdictional, Gedo v. Rose, supra, and because a lack of subject matter jurisdiction can be raised at any time, Crump v. Crump, supra, the trial court committed prejudicial and reversible error when it denied Mr. Henshaw's Motion to Vacate, under the provisions of Rule 60(b)(4) URCP, based on its incorrect conclusion that "*A motion under Rule 60(b)(4) must be filed within a reasonable time,*" and that Mr. Henshaw's Motion to Vacate was untimely, under the provisions of Rule 60(b)(4) URCP. Therefore, this Court must reverse the trial court's denial of Mr. Henshaw's Motion to Vacate and remand this case back to the trial court with instructions to grant Mr. Henshaw's Motion to Vacate.

X
CONCLUSION AND REQUEST FOR RELIEF

Because the Kings do not have standing to even assert that Raymond Watrous' interest in the water rights the Kings sold to him and Mildred Watrous did not pass to Mildred at the time of Raymond's death, the trial court never had jurisdiction to even hear or rule on the Kings claim that Raymond's interest in the water rights did not pass to Mildred at the time of Raymond's death. Because the trial court never had jurisdiction to hear or rule on the Kings claim that Raymond's interest in the water rights did not pass to Mildred at the time of Raymond's death, the trial court committed plain, prejudicial and reversible error when it denied Mr. Henshaw's Motion to Vacate that portion of the trial court's directed verdict holding that Raymond's interest in the water rights did not pass to Mildred at the time of Raymond's death, is void as a matter of law. Therefore, this Court must reverse that portion of the trial court's directed verdict holding that Raymond's interest in the water rights did not pass to Mildred at the time of Raymond's death and remand this case back to the trial court directing it to vacate the portion of its directed

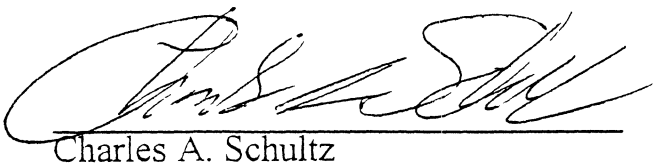
verdict holding that Raymond's interest in the water rights did not pass to Mildred at the time of Raymond's death.

Because the trial court based its ruling that Mr. Henshaw's Motion to Vacate, under Rule 60(b)(4) URCP, *"should be denied as untimely,"* because the trial court incorrectly concluded: *"A motion under Rule 60(b(4) must be filed within a reasonable time,"* without regard for clear and controlling Utah case law holding that:

> *[T]here is no time limit on an attack on a judgment as void. The one-year [three-month, in Utah] limit applicable to some Rule 60(b) motions is expressly inapplicable, and even the requirement that the motion be made within a "reasonable time," which seems literally to apply to motions under Rule 60(b)(4), cannot be enforced with regard to this class of motion.*

Garcia v. Garcia, supra, because standing is jurisdictional, Gedo v. Rose, supra, and because a lack of subject matter jurisdiction can be raised at any time, Crump v. Crump, supra, the trial court committed prejudicial and reversible error when it denied Mr. Henshaw's Motion to Vacate, under the provisions of Rule 60(b)(4) URCP, based on its incorrect conclusion that *"A motion under Rule 60(b)(4) must be filed within a reasonable time,"* and on its incorrect conclusion that Mr. Henshaw's Motion to Vacate was untimely, under the provisions of Rule 60(b)(4) URCP. Therefore, this Court must reverse the trial court's denial of Mr. Henshaw's Motion to Vacate and remand this case back to the trial court with instructions to grant Mr. Henshaw's Motion to Vacate.

Respectfully submitted this 18th day of May 2009.



Charles A. Schultz
Attorney for Dee Henshaw

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of May 2008, I hand delivered two true and correct copes of the foregoing Brief to the person(s) at the address(es) below:

David R. Williams
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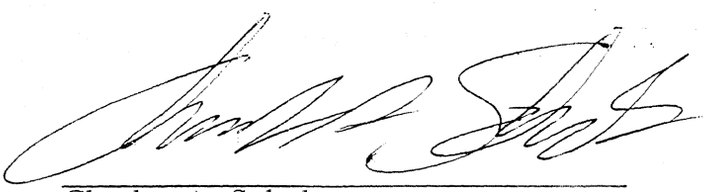
Salt Lake City, Utah 84111-3358



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APPENDIX

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IN THE SIXTH JUDICIAL DISTRICT COURT OF WAYNE COUNTY
STATE OF UTAH

DEE HENSHAW Plaintiff, vs. THE ESTATE OF JACK KING, Defendant.	*MOTION TO VACATE* Civil No. 00600007 Judge: Lee

COMES NOW, Dee Henshaw and, pursuant to the provisions of Rule 60(b) URCP, moves this Court to vacate that portion all of the defendants' Order on Motions for Directed the

Verdict ruling that Mr. Henshaw did not acquire any right, title or interest in the water sold by the Kings to Watrouses, on the ground that the portion of the defendants' Order on Motions for Directed Verdict ruling that Mr. Henshaw did not acquire any right, title or interest in the water sold by the Kings to Watrouses is void as a matter of law.

This Motion is also based on the memorandum filed in support of this Motion and the Exhibits attached thereto.

WHEREFORE, Dee Henshaw moves this Court to vacate that portion all of the defendants' Order on Motions for Directed Verdict ruling that Mr. Henshaw did not acquire any right, title or interest in the water sold by the Kings to Watrouses

Respectfully submitted this 4th day of January 2008.

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IN THE SIXTH JUDICIAL DISTRICT COURT OF WAYNE COUNTY
STATE OF UTAH

DEE HENSHAW Plaintiff, vs. THE ESTATE OF JACK KING, Defendant.	***MEMORANDUM IN SUPPORT OF MOTION TO VACATE*** Civil No. 00600007 Judge: Lee

COMES NOW, Dee Henshaw and submits the following Memorandum In Support of his Motion to Vacate that portion of the defendants' Order on Motions for Directed Verdict ruling that Mr. Henshaw did not acquire any right, title or interest in the water sold by the Kings to Watrouses.

STATEMENT OF FACTS

1. At the close of the Plaintiffs' case, the Court orally granted in part the defendants' motion for a directed verdict.

2. As a part of the Court's grant of a directed verdict in favor of the defendants, the Court ruled that Mr. Henshaw did not acquire any right. title or interest in the water or water rights deeded to Raymond Watrous, and that Raymond Watrous' interest in the water and/or water rights, deeded to the Watrouses by the defendants, did not pass to Mildred Watrous upon the death of Raymond Watrous.

3. On or about May 4. 2006. the defendants filed it proposed directed verdict with the Court.

4. On May 15, 2006, Mr. Henshaw filed an objection to the defendants' proposed directed verdict.

5. On May 15. 2006. the Court signed and entered the defendants' proposed directed verdict.

6. From the first time that the Kings raised their claim that Raymond Watrous' interest in the water the Kings sold to the Watrouses did not pass to Mildred upon Raymond's death, through the oral arguments and on the Kings motion for directed verdict that Raymond Watrous' is interest in the water rights the Kings sold to Watrouses did not pass to Mildred upon Raymond's death, Mr. Henshaw has repeatedly and continually asserted that the Kings do not have, and never had. standing to claim that the water rights the Kings sold to the Watrouses did

not pass to Mildred Watrous upon Raymond's death.

7. Mr. Henshaw specifically argued at the hearing on the Kings' motion for directed verdictthat the Kings did not have standing to assert that Raymond Watrouses interest in the water rights the Kings sold to the Watrouses did not pass to Mildred at Raymond death.

8. None-the-less, the court granted the Kings motion for directed verdict, and ruled that Raymond Watrouses interest in the water the water, that the Kings sold to the Watrouses, did not pass to Mildred upon Raymond death, and without explaining how the court determined that the Kings had standing to even assert that Raymond Watrouses interest in the water did not pass to Mildred upon Raymond's death.

9. In its decision in denying Mr. Henshaw's Rule 59 motion, the court again failed and refused to specify how it determined that the Kings had standing to assert that Raymond Watrous' interest in the water did not pass to Mildred upon Raymond death.

10. It is undisputed that at the time of Raymond Watrous' death, the Kings were not heirs, devisees, beneficiaries, or creditors of Mr. Watrous or of his estate.

11. It is undisputed that neither at the time Watrouses death, nor at any time after his death, the Kings asserted any claim against either Raymond Watrous or his estate.

ARGUMENT

BECAUSE THE KINGS NEVER HAD STANDING TO ASSERT THAT RAYMOND WATROUS' INTEREST IN THE WATER RIGHTS SOLD TO WATROUSES DID NOT PASS TO MILDRED WATROUS AT THE TIME OF RAYMOND WATROUSES DEATH, THIS COURT NEVER HAD JURISDICTION TO HEAR OR RULE ON THE KINGS CLAIM THAT RAYMOND WATROUS INTEREST IN THE WATER RIGHTS SOLD TO WATROUSES DID NOT PASS TO MILDRED WATROUS AT THE TIME OF RAYMOND WATROUSES DEATH. THEREFORE, THAT PORTION OF THE DIRECTED VERDICT RULING THAT MR. HENSHAW DID NOT ACQUIRE ANY Right, title OR INTEREST TO THE WATER SOLD BY THE KINGS TO THE WATROUS IS VOID AS A MATTER OF LAW, AND THEREFORE MUST BE VACATED.

POINT I
STANDING IS JURISDICTIONAL

In *Jenkins v. Swan*, 675 P.2d 1145 (Utah 1983), the Utah Supreme Court stated: *"the moving party must have standing to invoke the jurisdiction of the court."*

> *¶9 Standing is a jurisdictional requirement that must exist before a court may entertain a controversy. See Jones v. Barlow, 2007 UT 20, ¶12, 154 P.3d 808. Without the jurisdictional requirement of standing, a court has no authority to act. See, e.g., Utah Chapter of the Sierra Club v. Utah Air Quality Bd., 2006 UT 74, ¶17, 148 P.3d 960 ("Utah standing law 'operates as gatekeeper to the courthouse, allowing in only those cases that are fit for judicial resolution.'" (quoting Terracor v. Utah Bd. of State Lands & Forestry, 716 P.2d 796, 798-99 (Utah 1986))).* (Emphasis added).

2007 P.3d (2007 UT App 154); *Gedo v. Rose*; 2007 UT App 154.

POINT II
THE KINGS HAVE NOT, AND CANNOT, ESTABLISH THAT THEY EVER HAD STANDING, TO ASSERT THAT RAYMOND WATROUS' INTEREST IN THE WATER SOLD TO WATROUSES DID NOT PASS TO MILDRED WATROUS AT THE TIME OF RAYMONDS' DEATH.

"Anyone bringing an original proceeding---a dispute that is being presented to the courts

for the first time---must satisfy the traditional standing test." *Jenkins v. Swan*, 675 P.2d at 1148, 1151 (Utah 1983).

> *Our generally stated standing rule is that a plaintiff must have suffered "some distinct and palpable injury that gives him [or her] a personal stake in the outcome of the legal dispute."(fn3) Jenkins v. Swan, 675 P.2d 1145, 1148 (Utah 1983); accord Utah Restaurant Association v. Davis County Board of Health, 709 P.2d at 1162; Kennecott Corp. v. Salt Lake County, 702 P.2d 451, 454 (Utah 1985); see Baird v. State, 574 P.2d 713 (Utah 1978). The need for such a personal stake frequently is described as a requirement that the plaintiff's injury be "particularized." The traditional standing requirement is generally justified on grounds that in the absence of a requirement that a plaintiff have a "personal stake in the outcome" or a "particularized injury," the courts might permit themselves to be drawn into disputes that are not fit for judicial resolution or amount to "generalized grievances that are more appropriately directed to the legislative and executive branches of the state government." Jenkins v. Swan, 675 P.2d at 1149; see Terracor v. Utah Board of State Lands & Forestry, 716 P.2d at 798-99; Baird v. State, 574 P.2d 713, 717 (Utah 1978).(fn4)* (Emphasis added).

Society of Professional Journalists, Utah Chapter v. Vullock, 743 P.2d 1166 (Utah 1987).

> *As a general proposition the right to commence a legal proceeding depends on the plaintiffs' suffering an injury to a legally protected right for which the law provides a remedy. Absent such a showing, there is no right to complain in the courts.(fn2)*

Stromquist v. Cokayne, 646 P.2d 746 (Utah 1982), citing *Jenkins v. State*, Utah, 585 P.2d 442 (1978).

> *One aspect of general standing doctrine we share with the federal courts is the basic requirement that the complainant show "'some distinct and palpable injury that gives him [or her] a personal stake in the outcome of the legal dispute.'"*

Provo City Corp. v. Willden, 768 P.2d 455 (Utah 1989).

> *Utah law requires that the parties to a lawsuit have a sufficient interest in the subject matter of the dispute in order to confer standing upon them. See Terracor v. Utah Bd. of State Lands & Forestry, 716 P.2d 796, 798 (Utah 1986). Either party, or the court on its own motion, may properly raise the issue of standing for the first time on appeal. Blodgett*

v. Zions First Nat'l Bank, 752 P.2d 901, 904 (Utah Ct.App. 1988). (Emphasis added).

Wade v. Burke, 800 P.2d 1106 (Ut. App. 1990).

In *Haymond v. Bonneville Billing & Collections* 89 P.3d 171 (Utah 2004), the Utah Supreme Court again discussed the applicable standards for standing in Utah. In *Bonneville*, the Supreme Court specifically held that:

> *As a general rule, a person can sustain a cause of action only where he has sustained some injury to his legal personal or property rights, the injury and the cause of action being contemporaneous." 1A C.J.S. Actions § 32a (1985); Jenkins v. Swan, 675 P.2d 1145, 1148 (Utah 1983).* (Emphasis added).
>
> *A plaintiff who has not been granted standing to sue by statute must either show that he has or would suffer a "distinct and palpable injury that gives rise to a personal stake in the outcome" of the case or meet one of the two exceptions to standing recognized in cases involving "important public issues." Wash. County Water Conservancy Dist. v. Morgan, 2003 UT 58, ¶ 17, 82 P.3d 1125.*

2006 P.3d (2006 UT 36); *In the Matter of E.H.* ¶49.; 2006 UT 36.

> *In general, standing is available only to a person who has sustained some injury to her legal, personal, or property rights. Jenkins v. Swan, 675 P.2d 1145, 1148 (Utah 1983).*

¶50, id.

In this case, the Kings have not, and cannot, show that they have standing to assert that Raymond Watrous' interest in the water they sold to the Watrouses did not pass to Mildred Watrous at the time of Raymond's death.

In order for the Kings to assert that they have standing to claim the Raymond Watrous' interest in the water they sold to Watrouses did not passed to Mildred at the time the Raymond's death, the Kings would have to show that *"interested persons"* as defined in the Utah Probation Code, i.e., they are heirs of Raymond Watrous, children of Raymond Watrous, devisees of

Raymond Watrous, creditors of Raymond Watrous, or others having a property right in or claim against the estate of Raymond Watrous' estate.

> *"Interested persons" includes heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a property right in or claim against the estate of a decedent which may be affected by the proceedings. U.C.A., 1953, § 75--1--201(20) (1978 ed.).*
>
> *When a statute creates a cause of action and designates those who may sue under it, none except those designated may sue. Berry Properties v. City of Commerce City, Colo.App., 667 P.2d 247 (1983).* (Emphasis added).

In Re: Estate of Peterson, 716 P.2d 801 (Utah 1986).

The present version of the Utah Probate Code specifies as follows:

> *"Interested person" includes heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a property right in or claim against a trust estate or the estate of a decedent, ward, or protected person. It also includes persons having priority for appointment as personal representative, other fiduciaries representing interested persons, a settlor of a trust, if living, or the settlor's legal representative, if any, if the settlor is living but incapacitated. The meaning as it relates to particular persons may vary from time to time and shall be determined according to the particular purposes of, and matter involved in, any proceeding.* UCA § 75-1-201(24).

In the instant matter, it is undisputed that the Kings cannot satisfy the requirements of the Utah probate code to show that they are "interested persons" as mandated in the Utah Probate Code in order to file a claim against the estate of Raymond Watrous. The Kings have not claimed, and cannot claim, that they all are *"heirs, devisees, children, spouses, creditors, beneficiaries"* of Raymond Watrous, or that they are "*others having a property right in or claim against a trust estate or the estate of*" of Raymond Watrous. Therefore, the Kings cannot, and have not, established that they have standing, or would have had standing, to assert that Raymond Watrous' interest in the water they sold to the Watrouses did not pass to Mildred Watrous at Raymond's death, in any probate proceeding.

Because, as a matter of law, the Kings do not, and did not have standing to assert that Raymond Watrous' interest in the water they sold to the Watrouses did not pass to Mildred Watrous at Raymond's death, in any probate proceeding, they cannot establish that they have any

right to assert in a collateral proceeding that Raymond Watrous' interest in the water they sold to the Watrouses did not pass to Mildred Watrous at Raymond's death, in any probate proceeding. The Kings cannot obtain more legal rights in a collateral proceeding than they would have in a direct probate proceeding. Therefore, the Kings have no standing to assert in this proceeding that the water they sold to the Watrouses did not pass to Mildred Watrous at Raymond's death.

Because the Kings do not have standing to assert, in this proceeding, that the water they sold to the Watrouses did not pass to Mildred Watrous at Raymond's death, this court's Order on Motions for the point in Directed Verdict ruling that Mr. Henshaw did not acquire any right, title or interest in the water sold by the Kings to Watrouses is void as a matter of law, and must be vacated.

POINT III

BECAUSE THE KINGS NEVER HAD STANDING, AND TO NOT HAVE STANDING, TO ASSERT THAT RAYMOND WATROUS' INTEREST IN THE WATER RIGHTS SOLD TO WATROUSES DID NOT PASS TO MILDRED WATROUS AT THE TIME OF RAYMOND WATROUSES DEATH, THIS COURT NEVER HAD JURISDICTION TO HEAR OR RULE ON THE KINGS CLAIM THAT RAYMOND WATROUS' INTEREST IN THE WATER RIGHTS SOLD TO WATROUSES DID NOT PASS TO MILDRED WATROUS AT THE TIME OF RAYMOND'S DEATH.

As previously established in this memorandum, standing is jurisdictional. *Jenkins v. Swan* and *Gedo v. Rose*, supra.

Because the Kings have not established, and cannot, established that they have standing to assert that Raymond Watrous' interest in the water rights, sold to the Watrous by the Kings, did not pass to the Watrouses at Raymond death, that portion of this court's Order on Motions for Directed Verdict ruling that Mr. Henshaw did not acquire any right, title or interest in the water sold by the Kings to Watrouses is void as a matter of law, and must be vacated.

Any order entered by a court, without proper jurisdiction, is void as a matter of law. *"the moving party must have standing to invoke the jurisdiction of the court." Jenkins v. Swan,* supra.

Standing is a jurisdictional requirement that must exist before a court may entertain a

controversy. See Jones v. Barlow, 2007 UT 20, ¶12, 154 P.3d 808. Without the jurisdictional requirement of standing, a court has no authority to act. (Emphasis added).

Gedo v. Rose, supra.

CONCLUSION

Because the Kings have not, and cannot, establish that they are interested parties, as defined in the Utah probate code, they cannot establish that they have standing to assert that Raymond Watrous' interest in the water rights, they sold to Watrouses, did not pass to Mildred upon Raymond death. Because, the Kings do not have standing, in this proceeding, to assert that Raymond Watrous' interest in the water rights, they sold to the Watrouses, did not pass to Mildred upon Raymond death, this court lacked jurisdiction to hear, and rule upon, the Kings claim that Raymond Watrous' interest in the water rights the Kings sold to the Watrouses did not pass to Mildred up one Raymond death. Because this court lacked jurisdiction to hear and rule upon the Kings claim that Raymond Watrous' interest in the water rights sold to the Watrouses did not pass to Mildred upon Raymond death, that portion of this court's Order on Motions for Directed Verdict ruling that Mr. Henshaw did not acquire any right, title or interest in the water sold by the Kings to Watrouses is void as a matter of law. and must be vacated.

Dated this 4th day of February 2008.

Charles A. Schultz
Attorney for Dee Henshaw

//

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IN THE SIXTH JUDICIAL DISTRICT COURT OF WAYNE COUNTY
STATE OF UTAH

DEE HENSHAW Plaintiff, vs. THE ESTATE OF JACK KING, Defendant.	***REPLY MEMORANDUM IN SUPPORT OF MOTION TO VACATE*** Civil No. 00600007 Judge: Lee

COMES NOW, Dee Henshaw and submits the following Reply Memorandum In Support of his Motion to Vacate that portion of the defendants' Order on Motions for Directed Verdict ruling that Mr. Henshaw did not acquire any right, title or interest in the water sold by the Kings to Watrouses

SUPPLEMENTAL STATEMENT OF FACTS

1. The defendants initially asserted, in their memorandum in opposition to Mr. Henshaw's Motion to Vacate, that Mr. Henshaw never asserted during the oral argument on the defendant's motion for a directed verdict, that the defendants did and/or do not have standing to standing to assert that Raymond Watrous's interest in the water rights, the Kings sold to Raymond and Mildred Watrous, did not pass to Mildred upon Raymond's death. However, in their objection to Mr. Henshaw's Motion to Enlarge, the defendants now admit that Mr. Henshaw did in fact argue, during the oral argument on the defendant's motion for a directed verdict, that the defendants did and/or do not have standing to standing to assert that Raymond Watrous's interest in the water rights, the Kings sold to Raymond and Mildred Watrous, did not pass to Mildred upon Raymond's death. See the defendants; memorandum in opposition to enlarge time to file reply memorandum, page 2, ¶ 1, a copy of which is attached to this Memorandum as Exhibit 1.

2. At his deposition on August 23, 2004, Jack King made the following admissions under oath:

Q. Okay. Then you're admitting here today, for the record, unequivocally, that you sold the Watresses 3 hours full flow of Pinecreek water?
A. Every 18 days.
Q. Every 18 days; is that correct?
A. That's right. (Page 59)

Q. Okay.
Are you now admitting, then, that the plaintiffs have the right to use water from Pinecreek for irrigation?
A. They -- they have 3 hours of every 18 days, but not through my pipeline. (Pages 13-14)

You've admitted that the Henshaws have the right to use some water; correct?
A. I admit that they had the right to use 3 hours

17 out of every 18 days. (Page 22)

19 Q. Are you now admitting that Exhibit No. 1 is in
20 fact a water deed for the sale of 3 hours of Pinecreek
21 water to Watresses?
22 A. Well, yeah, they got 3 hours.
23 Q. Okay. I just want to make it crystal clear
24 here because this has been the problem from day one of
25 this.
1 A. It shouldn't have been because I've already
2 admitted that a long time ago.
3 Q. Okay. Then you're admitting here today, for
4 the record, unequivocally, that you sold the Watresses 3
5 hours full flow of Pinecreek water?
6 A. Every 18 days.
7 Q. Every 18 days; is that correct?
8 A. That's right.
9 Q. Okay. Great. (Pages 58-59)

2 A. Well, you -- you've already established with
3 Grace Potter that I deeded them over the three hours.
4 Q. You deeded them over the three hours?
5 A. That's right.
6 Q. Okay. So they own the three hours; is that
7 correct?
8 A. I guess they do.
9 Q. Okay. Excellent. (Page 10)

25 Q. Are you now admitting, then, that the
1 plaintiffs have the right to use water from Pinecreek
2 for irrigation?
3 A. They -- they have 3 hours of every 18 days,
4 but not through my pipeline.
5 Q. But not through your pipeline, okay. (Pages 13-14)

13 Q. Let me rephrase it, then.
14 You've admitted that the Henshaws have the
15 right to use some water; correct?
16 A. I admit that they had the right to use 3 hours

out of every 18 days.
Q. Okay, fine. They had the right to use 3 hours in 18 days. (Page 22)

Q. How many people are you aware of that have water rights on Pinecreek?
A. Just me and the State Fish and Game.
Q. You're not aware of anyone else?
A. Well, just Dee, got that 3 hours.
Q. All right. Okay. (Page 35)

Copies of the referenced pages from King's deposition are attached to this Memorandum as Exhibit 2.

ARGUMENT

BECAUSE THE KINGS NEVER HAD STANDING TO ASSERT THAT RAYMOND WATROUS' INTEREST IN THE WATER RIGHTS SOLD TO WATROUSES DID NOT PASS TO MILDRED WATROUS AT THE TIME OF RAYMOND WATROUSES DEATH, THIS COURT NEVER HAD JURISDICTION TO HEAR OR RULE ON THAT CLAIM. THEREFORE, THAT PORTION OF THE DIRECTED VERDICT RULING THAT MR. HENSHAW DID NOT ACQUIRE ANY RIGHT, TITLE OR INTEREST TO THE WATER SOLD BY THE KINGS TO THE WATROUS IS VOID AS A MATTER OF LAW, AND THEREFORE MUST BE VACATED.

POINT I

MR. HENSHAW'S MOTION TO VACATE FOR LACK OF JURISDICTION IS TIMELY

The defendants' assertion that Mr. Henshaw's Motion to Vacate is not timely is simply ridiculous, and to even assert that there is a time limit for vacating a void judgment is an insult to the court and a violation of the defendants' counsel's duty or\f candor and honesty to the court.

The defendants' assertion that this court was not divested of its jurisdiction to entertain and rule upon a Rule 60 motion during the appeal of this matter, is true, but irrelevant, and their assertion that Mr. Henshaw is now precluded from filing his Rule 60(b) motion because he did not file it during the pendency of his appeal is also a deliberate misrepresentation of the law to the court. No Utah appellate court has ever held that a party must file a Rule 60 motion while a case is on appeal or that he will be precluded from filing such motion after the case has been remanded to the trial court.

The defendant's citations to various federal and state cases discussing what is a reasonable time to file a Rule 60(b) motion, under the FRCP, are not only irrelevant, they are deliberately misleading. In none of the cases cited by the defendants' was there an issue of the basic subject matter jurisdiction of the trial court.

Mr. Henshaw's Motion to Vacate is based on the undeniable fact that this court never had jurisdiction to hear or rule on the defendants' claim that Raymond Watrous's interest in the water rights, the Kings sold to Raymond and Mildred Watrous, did not pass to Mildred upon Raymond's death. That lack of jurisdiction makes that portion of the court's directed verdict, holding that the Raymond Watrous's

interest in the water rights Jack and Bonnie King sold to Raymond and Mildred Watrous did not pass to Mildred upon Raymond's death, void as a matter of law, and a void judgment can never become a valid judgment through the passage of time.

In *State v. Valdez*, 65 P.3d 1191(Ct. App. 2003), the Utah Court of Appeals stated: *"It is well-settled that subject matter jurisdiction may be raised at any time, by either party or the court. See State v. Perank, 858 P.2d 927, 930 (Utah 1992)."*

> *Standing, of course, is an issue that is never waived and can be raised by any party or by the court at any time. See Terracor, 716 P.2d at 798; Stromquist, 646 P.2d at 747; Wade v. Burke, 800 P.2d 1106, 1108 (Utah Ct.App.1990); Blodgett v. Zions First Nat'l Bank, 752 P.2d 901, 904 (Utah Ct.App.1988).*

In re: Estate of Hunt, 842 P.2d 872 (Utah 1992)

In *Garcia v. Garcia*, 712 P.2d 288, 291 (Utah 1986), the Utah Supreme Court declared:

> *Either a judgment is void or it is valid. Determining which it is may well present a difficult question, but when that question is resolved, the court must act accordingly.*
>
> *By the same token, there is no time limit on an attack on a judgment as void. The one-year [three-month, in Utah] limit applicable to some Rule 60(b) motions is expressly inapplicable, and even the requirement that the motion be made within a "reasonable time," which seems literally to apply to motions under Rule 60(b)(4), cannot be enforced with regard to this class of motion. A void judgment cannot acquire validity because of laches on the part of the judgment debtor.* (Emphasis added).

Because there is no time limit for filing a challenge to the jurisdiction of a court, Mr. Henshaw's Motion to Vacate based on this court's lack of jurisdiction is timely and proper.

> *A lack of subject matter jurisdiction can be raised at any time and when subject matter jurisdiction does not exist, neither the parties nor the court can do anything to fill that void.*

Crump v. Crump, 821 P.2d 1172 (Ut. App. 1991), see also, 44 P.3d 724; *Housing Authority of the City of Salt Lake v. Snyder*; 2002 UT 28, 67 P.3d 1055; *FISHER v. FISHER*; 2003 UT App 91 and *Curtis v. Curtis*, 790 P.2d 717 (Ut. App. 1990).

POINT II

THE DOCTRINE OF "DOCTRINE OF THE CASE" IS NOT APPLICABLE TO MR. HENSHAW' MOTION TO VACATE.

The Kings assert that Mr. Henshaw's Motion to Vacate that portion of the directed verdict holding that Raymond Watrous's interest in the water rights the Kings sold to the Watrouses did not pass to Mildred Watrous upon Raymond's death is barred by the doctrine of the law of the case. That assertion is absolute nonsense. It is spurious, disingenuous and is a breach of King's counsel's duty of candor and honesty to the court to even make such a spurious assertion.

No court has ever ruled that the law of the case doctrine is superior to jurisdiction. Nothing is superior to jurisdiction.

The defendants have not cited, and cannot cite, this court to any case holding that a lack of jurisdiction can be over come by the doctrine of the law of the case, and claiming that it can is a deliberate misrepresentation of the law to the court.

> *We have held that while defects in personal jurisdiction can be waived, subject matter jurisdiction goes to the very power of a court to entertain an action. A lack of subject matter jurisdiction cannot be stipulated around nor cured by a waiver. A lack of subject matter jurisdiction can be raised at any time and when subject matter jurisdiction does not exist, neither the parties nor the court can do anything to fill that void.* (Emphasis added).

Crump v. Crump, supra.

> *[T]o entertain a dispute, a court must have jurisdiction over both the subject matter of the dispute and the individuals involved. If the court lacks either type of jurisdiction, it has no power to entertain the suit. See generally 5 C. Wright & A. Miller, Federal Practice and Procedure § 1350 (1969). Moreover, while defects in personal jurisdiction can be waived, subject matter jurisdiction goes to the very power of a court to entertain an action. Id. A lack of subject matter jurisdiction cannot be stipulated around nor cured by a waiver. Id. A lack of subject matter jurisdiction can be raised at any time and when subject matter jurisdiction does not exist, neither the parties nor the court can do anything to fill that void. Id.* (Emphasis added).

Curtis v. Curtis, supra.

If the court does not have jurisdiction to act, nothing the court does, any order it issues, any

holding it makes, or any issue it decides is valid, and it does not make any difference how long the erroneous order, holding or the improper decision has been in effect. Without jurisdiction, no order issued by a court, no decision issued by a court or no holding of a court is ever valid.

> *A void judgment cannot subsequently become a valid judgment. "Either a judgment is void or it is valid. Determining which it is may well present a difficult question, but when that question is resolved, the court must act accordingly." Garcia v. Garcia, 712 P.2d 288, 291 (Utah 1986) (quoting 11 Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 2862 (1973)).* (Emphasis added).

Jenkins v. Weis, 868 P.2d 1374 (UT. App. 1994). *"A void judgment cannot acquire validity because of laches on the part of the judgment debtor." Garcia v. Garcia*, 712 P.2d 288, 291 (Utah 1986).

A divorced modification issued by a juvenile court will never become valid, under the doctrine of the law of the case, because a juvenile court does not have jurisdiction to enter a modification of a divorce decree. A boundary line determination in a real property dispute, determined by a small claims court, will never be valid under the doctrine of the law of the case, because a small claims court does not have jurisdiction over real property. A felony conviction, entered by a justice court, will never become a valid judgment under the doctrine of the law of the case, because a justice court does not have jurisdiction over felonies. A determination of immigration status by a state district court will never be valid, under the doctrine of the law of the case, because only the federal courts have jurisdiction over immigration matters.

Likewise, because the defendants do not now have, and have never had, standing to assert that Raymond Watrous' interest in the water rights, that the Kings admit they sold to the Watrouses, did not pass to Mildred Watrous upon Raymond's death, this court lacks jurisdiction to even consider the Kings claim that Raymond Watrous's interest in the water, rights that the Kings admit they sold to the Watrouses, did not pass to Mildred Watrous upon Raymond's death. Therefore, that portion of the order on the defendants' motion for a directed verdict, holding that Raymond Watrous' interest in the water rights, that Kings admit that they sold to the Watrouses, did not pass to Mildred Watrous upon Raymond's death is void as a matter of law, and can never become a valid order, under the doctrine of the law of the case. The

doctrine of law the case cannot make an order that was entered without jurisdiction a valid and enforceable order, no matter how long the order has existed or may exist.

A void order can never become a valid order, no matter how long it may be in existence. An order entered without jurisdiction to enter the order is a void order, and it will never become a valid order no matter how long it may be in existence. See, *Garcia v. Garcia* and *Jenkins v. Weis*, supra. Therefore. Mr. Henshaw's Motion to Vacate must be granted as a matter of law.

POINT III

THE KINGS NEVER HAD STANDING, AND DO NOT HAVE STANDING, TO ASSERT THAT RAYMOND WATROUS' INTEREST IN THE WATER RIGHTS SOLD TO WATROUSES DID NOT PASS TO MILDRED WATROUS AT THE TIME OF RAYMOND WATROUSES DEATH.

The defendants make the ridiculous claim that standing only applies to plaintiffs and not defendants. It is true that standing does not apply to defendants, if their status in a legal proceeding is only that of a defendant. However, if a defendant becomes a counterclaim plaintiff or a cross-claim plaintiff, the same requirements for standing applies to the counterclaim defendant and cross-claim defendant as it does to a plaintiff. Any party, whether an original plaintiff, a counterclaim plaintiff or a cross-claim plaintiff is required to prove he has standing to assert a claim.

As a part of both of their counterclaims, filed in conjunction with their answer, and their amended answer, the Kings asserted a claim for quiet title. In those claims for quiet title, the Kings sought to have the trial court rule that Raymond Watrous' water rights did not pass to Mildred Watrous at the time of Raymond's death. In pertinent part, both the Kings' counterclaim and amended counterclaim read as follows:

> *Defendants Jack and Bonnie King counterclaim against Plaintiffs Barbara, Dee and Dana Henshaw, as follows:*
> *6. The Kings are the owners of certain water rights in and to Pine Creek including, but not limited to, those rights represented by the Utah Division of Water Rights, Water Right nos. 95-1629 and 95-5 17.*
> *7. The Plaintiffs claim an interest in the water rights adverse to the Kings. The Plaintiffs' claim*

is without any right whatever, and the Plaintiffs have no estate, right, title, lien or interest in or to the water rights or any part of the water rights.
8. Since approximately July, 1992, the Plaintiffs have used and continue to use water from Pine Creek.
9. The Plaintiffs have no right to use water from Pine Creek, and their use of such water has harmed the defendants.
WHEREFORE, the defendants request the Court:
1. Require that the Plaintiffs, and all persons claiming under them, set forth the nature of their claims to the water rights described herein.
2. Determine all adverse claims to the water rights described herein by decree of the Court.
3. Declare that defendants Jack and Bonnie King, own in fee simple and are entitled to the quiet and peaceful possession of the water rights described in this Complaint and that the Plaintiffs and all persons claiming under them have no right to or interest in the water rights or any part thereof.
4. Permanently enjoin the Plaintiffs, each of them, and all persons claiming under them from asserting any adverse claim to the Kings' title to the water rights, and from using any water from Pine Creek. (Emphasis added).

Because the Kings asserted counterclaims seeking to quiet title to the water rights they admit they sold to the Watrouses, they were required to demonstrate that they had standing to assert those claims, i.e., that they had standing to assert that Raymond Watrous' water rights did not pass to Mildred Watrous at the time of Raymond's death. The Kings did not do so, and they cannot do so. Therefore, the Kings lacked standing to even ask the trial court to hear or consider their claim that Raymond Watrous' water rights did not pass to Mildred Watrous at the time of Raymond's death, and the trial court lacked jurisdiction to hear and rule upon the Kings' claim that Raymond Watrous' interest in the water did not pass to Mildred Watrous at the time of Raymond's death.

In Jenkins v. Swan, 675 P.2d 1145 (Utah 1983), the Utah Supreme Court stated: *"the moving party must have standing to invoke the jurisdiction of the court."*[1] *Because the* defendants asserted

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1. Even assuming, arguendo, that Raymond Watrous' ½ interest in the water, did not pass to Mildred Watrous upon Raymond's death, it did not pass to the Kings, and the Kings have no standing, in this proceeding, to claim that Raymond Watrous' ½ interest in the water did not pass to Mildred Watrous upon Raymond Watrous' death. Whether Raymond's ½ interest in the water passed ¼ to Mildred and 1/8 to each of his two children, 1/6 to Mildred and 1/6 to each of his two children or passed to them in some other percentage, it is irrelevant in this proceeding. Whatever happened to Mr. Watrous' ½ of the water, it did not pass to the Kings, and the Kings have no standing to assert possible claims to the ownership of the water, or water rights, on the part of Mr. Watrous' children or any other person or entity in this proceeding. Likewise they

counterclaims seeking to quiet title to the water rights, they admitted they sold to the Watrouses, the defendants had, and have, the duty to prove that they have standing to ask this court to rule that Raymond Watrous' water rights did not pass to Mildred Watrous at the time of Raymond's death. Because the defendants have not done that, and cannot to that, this court does not have jurisdiction to even hear or consider the Kings' claim that Raymond Watrous' water rights did not pass to Mildred Watrous at the time of Raymond's death. Therefore, the directed verdict entered by this court, holding that Raymond Watrous' water rights did not pass to Mildred Watrous at the time of Raymond's death, is void as a matter of law, and this court must grant Mr. Henshaw's Motion to Vacate that portion of the Order on Motion for Directed Verdict holding that Raymond Watrous' water rights did not pass to Mildred Watrous at the time of Raymond's death.

CONCLUSION

Because the Kings have not, and cannot, establish that they are interested parties, as defined in the Utah Probate Code, they cannot establish that they have standing to assert that Raymond Watrous' interest in the water rights, the Kings admit they sold to Watrouses, did not pass to Mildred upon Raymond death.

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have no standing to assert a claim that Raymond Watrous' ½ interest in the water, did not pass to Mildred Watrous on behalf of the public at large.

The Kings have not, and cannot, show any legal or equitable interest in Raymond's ½ interest in the water. The Kings have not, and cannot, show that they will be harmed or prejudiced in any way whatsoever if Raymond's ½ interest in the water, passed to Mildred Watrous rather than to some other person or entity. The Kings have not, and cannot, show any significant public interest in the ownership of the water, that would give them standing to litigate the disposition of Raymond's ½ interest in the water in the interest of the public at large.

Because the Kings cannot *"show some distinct and palpable injury that gives rise to a personal stake in the outcome of the dispute,"* Sierra Club v. Dept. Of Environmental Quality, Div. Of Solid & Hazardous Waste, 857 P.2d 982 (Utah,1993), or great public interest that would give them standing to even assert a claim in this proceeding that Raymond Watrous' ½ interest in the water, or water rights did not pass to Mildred Watrous upon Raymond's death, under clear and indisputable Utah law, the Kings do not have standing to litigate the issue of the disposition of Raymond Watrous' ½ ownership of the water in this action.

Additionally, because Jack King admitted, under oath, that Mr. Henshaw owns all of the water rights, the Kings admit they sold to the Watrouses, the defendants not only cannot show that they have standing to assert that Raymond Watrous' interest in the water rights, the Kings admit they sold to the Watrouses, did not pass to Mildred Watrous upon Raymond's death, the defendants are legally estopped to even assert that Raymond Watrous' interest in the water rights, the Kings admit they sold to the Watrouses, did not pass to Mildred Watrous upon Raymond's death.

Because, the Kings do not have standing, to assert, in this proceeding, that Raymond Watrous' interest in the water rights, they sold to the Watrouses, did not pass to Mildred upon Raymond's death, this court lacks jurisdiction to hear, and rule upon, the Kings claim that Raymond Watrous' interest in the water rights, the Kings admit they sold to the Watrouses, did not pass to Mildred upon Raymond's death. Because this court lacked jurisdiction to hear and rule upon the Kings claim that Raymond Watrous' interest in the water rights, sold to the Kings sold to the Watrouses, did not pass to Mildred upon Raymond death, that portion of this court's Order on Motions for Directed Verdict ruling that Mr. Henshaw did not acquire any right, title or interest in the water sold by the Kings to Watrouses is void as a matter of law, and must be vacated.

Dated this 25th day of May 2008.

Charles A. Schultz
Attorney for Dee Henshaw

EXHIBIT 1

To alleviate the purported necessity of a transcript and to avoid the attendant delay, defendants consent that, for purposes of this motion only, the Court may assume the following: at oral argument plaintiff argued that defendants lacked standing to move for a directed verdict.

With this assumption in mind, defendants supplement their argument in opposition to plaintiff's motion to vacate with two additional points.

First, the law of the case prohibits the Court from revisiting the directed verdict. The Trial Court implicitly rejected plaintiff's "standing" argument by exercising jurisdiction and granting defendants' motion for directed verdict. If the plaintiff argued "standing" at oral argument on the motion for directed verdict, then the Trial Court also expressly rejected plaintiff's argument. "Where . . . any . . . final ruling or order of the trial court goes unchallenged by appeal, such becomes the law of the case, and is not thereafter subject to later challenge." *Tracy v. University of Utah Hospital*, 619 P.2d 340, 342 (Utah 1980). "In the present action, having failed to perfect an appeal from the trial court's [decision] . . . the applicant is barred from again litigating that issue." *Id.* If plaintiff was dissatisfied with the Trial Court's final decision on the standing issue, his sole remedy was an appeal and he failed to timely perfect an appeal of the issue.

Second, a Rule 60(b) motion must be "made within a reasonable time." Utah R. Civ. P. 60 (b). It was unreasonable for plaintiff to wait until February 2008 to file his motion to vacate if he "discovered" the issue of defendants' standing in June 2006 (the date of his motion to alter or

EXHIBIT 2

fair share?

A. Well, you -- you've already established with Grace Potter that I deeded them over the three hours.

Q. You deeded them over the three hours?

A. That's right.

Q. Okay. So they own the three hours; is that correct?

A. I guess they do.

Q. Okay. Excellent.

Now, the Watresses used the irrigation from 1978 through 1992, when they sold the property to Henshaws; is that correct?

A. Yeah.

Q. Let's look at Exhibit No. 1 and maybe that will help refresh your memory. Okay. I'd ask you to look at Exhibit No. 1, if you would, please. Do you see the date on that?

A. Up here, March of '78.

Q. Right.

A. That's what it would be.

Q. It's recorded there, and then your signature is down here lower, and that says 3rd of March 1978, so that's when you sold them the property -- I'm sorry, sold them the water rights?

A. I let him use the water before then.

Q. Okay. Didn't -- did not the Henshaws claim in their suit against you that you had terminated their use of the water? Wasn't that the basis of the lawsuit, that you had cut off the water?

A. I don't know.

Q. Okay. The second paragraph No. 8 on page 7, take a look at that, if you would, please.

A. (Witness complies.)

Q. Have you had a chance to look at that?

A. Yes, (Inaudible).

Q. Now, that says the plaintiffs have no right to use water from Pinecreek and their use of such water has harmed the defendant; is that correct?

A. That's what it says.

Q. Okay.

A. But -- yeah.

Q. Good.

Was it your assertion at the time that this answer was filed that the plaintiffs had no right to use the water from Pinecreek?

A. I never asserted that.

Q. You've never asserted that?

A. No.

Q. Okay.

Are you now admitting, then, that the

plaintiffs have the right to use water from Pinecreek for irrigation?

A. They -- they have 3 hours of every 18 days, but not through my pipeline.

Q. But not through your pipeline, okay.

How -- what is your basis that they do not have the right to get the water through your pipeline?

A. They've never done anything on it and they've never paid me for the right to use my pipeline.

Q. Okay. Now, did not the Watresses pay you for the right to use your pipeline?

A. No.

Q. Did you not allow the Watresses to use your pipeline and connect their pipeline to your pipeline for a period of approximately 24 years?

A. That's right.

Q. All right.

Did Alan Bradberry ever tell you that you had the right to disconnect the Henshaws' water?

A. Yeah. I wouldn't know. I forget what Alan would say to me.

Q. Okay. Isn't it a fact, Mr. King, that you told John Hunt, when he was up to your property, that Alan Bradberry told you that you had the right to cut off the Henshaws' water?

A. That was the reason for putting it in.

Q. So that they couldn't -- so that they couldn't irrigate?

A. So that they couldn't steal my water.

Q. Well, if they were using -- if you say -- you've already admitted that they were entitled to use the three hours of water. If you potentially put this on there so they could not use it, then how are they stealing your water? Aren't you depriving them of their right to use the water that you just admitted that they had?

A. I believe you're turning things around.

Q. Let me rephrase it, then.

You've admitted that the Henshaws have the right to use some water; correct?

A. I admit that they had the right to use 3 hours out of every 18 days.

Q. Okay, fine. They had the right to use 3 hours in 18 days. And you knew that they were running that water through a three-inch pipeline and that it was coming off of one-inch risers into their handrails, into their hand lines, you knew that, didn't you?

A. Well, I guess.

Q. And you deliberately put a half-inch gate valve on that three-inch pipe to reduce the water,

plaintiffs have the right to use water from Pinecreek for irrigation?

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A. Well, I guess.

Q. And you deliberately put a half-inch gate valve on that three-inch pipe to reduce the water,

have gone back and forth on this, because I guess maybe we're just on different pages and didn't quite understand. Are you claiming that you own all of the water in Pinecreek?

A. I never did own that.

Q. Okay.

A. I (Inaudible).

Q. That's where the confusion was, because I asked you, "Admit that you do not own the full flow of the water from Pinecreek," and you denied that. You're not claiming that you own it, then, all of the water in Pinecreek?

A. That's right.

Q. Okay. How much do you claim you own?

A. I think it's 14 days out of 18, or maybe more. I don't know exactly. We've got it down there.

Q. How was the -- how was the water ownership on Pinecreek computed, do you know?

A. Everybody had so many days water and hours.

Q. How many people are you aware of that have water rights on Pinecreek?

A. Just me and the State Fish and Game.

Q. You're not aware of anyone else?

A. Well, just Dee, got that 3 hours.

Q. All right. Okay.

Q. Okay.

A. My son is (Inaudible) water meters employee.

Q. Okay. You heard Grace Potter testify earlier today, didn't you?

A. Yes.

Q. And she testified that she never would have notarized Exhibit No. 1 if you didn't sign it in front of her; isn't that correct?

A. That is correct.

Q. Is it your testimony that Grace Potter was lying when she made that statement?

A. I wouldn't call Grace a liar, but it's been a long time. I don't really know for sure which way it was, but my signature's here and my wife's signature's there.

Q. Okay.

A. And we admitted that that's our signature. Why are we dwelling on it?

Q. Are you now admitting that Exhibit No. 1 is in fact a water deed for the sale of 3 hours of Pinecreek water to Watresses?

A. Well, yeah, they got 3 hours.

Q. Okay. I just want to make it crystal clear here because this has been the problem from day one of this.

A. It shouldn't have been because I've already admitted that a long time ago.

Q. Okay. Then you're admitting here today, for the record, unequivocally, that you sold the Watresses 3 hours full flow of Pinecreek water?

A. Every 18 days.

Q. Every 18 days; is that correct?

A. That's right.

Q. Okay. Great.

MR. SCHULTZ: No further questions.

MR. WILLIAMS: I have a follow-up question. I'm going to mark this as Exhibit 10. I believe that's where we are.

(Exhibit No. 10 marked.)

EXAMINATION

BY MR. WILLIAMS:

Q. I don't have a copy of it so I'm going to ask you to take a look at it.

A. Okay.

Q. Jack --

MR. WILLIAMS: And just for identification purposes, I'm David Williams, I represent Jack and Bonnie King.

BY MR. WILLIAMS:

Q. Jack, I'm showing you what's been marked as

DISTRICT COURT, STATE OF UTAH
WAYNE COUNTY
Wayne County Courthouse, Loa, Utah 84747
Telephone: (435) 836-1301; Facsimile: (435) 836-2479

BARBARA HENSHAW, DEE HENSHAW, and DANA HENSHAW, Plaintiffs, vs. **THE ESTATE OF JACK KING and BONNIE KING,** Defendants.	**MEMORANDUM DECISION AND ORDER** Case No. **000600007** Assigned Judge: Wallace A. Lee

The following motions are pending in this case: (1) Plaintiffs' Motion to Vacate filed on 6 February 2008; (2) Plaintiffs' Motion to Enlarge Time to File Reply Memorandum filed on 5 March 2008; (3) Defendants' Motion for Rule 11 Sanctions filed on 20 March 2008; and (4) Plaintiffs' Motion to File Overlength Memorandum filed on 27 May 2008.

All these motions, except for the Motion for Rule 11 Sanctions, have been fully briefed and are now ready for a decision.

DECISION

Plaintiffs' Motion to Vacate should be denied. Plaintiffs' Motion to Enlarge Time to File Reply Memorandum should be granted. Defendants' Motion for Rule 11 Sanctions should not

be considered at this time. Plaintiffs' Motion to File Overlength Memorandum should be granted.

ANALYSIS

A. Motion to Enlarge Time to File Reply Memorandum and Motion to File Overlength Memorandum:

The plaintiffs requested additional time to file a Reply Memorandum in support of their Motion to Vacate. The plaintiffs sought additional time in order to obtain a transcript of the trial. However, the plaintiffs filed their Reply Memorandum on 27 May 2008, which was approximately three months late. The plaintiffs did not obtain the transcript and did not file it in support of their Reply.

Nevertheless, the Court is willing to consider the plaintiff's Reply Memorandum in conjunction with its ruling on the plaintiff's Motion to Vacate. To this extent, the plaintiffs' Motion to Enlarge Time to File Reply Memorandum should be granted.

Similarly, the Court finds the plaintiffs adequately explained their need to file an overlength memorandum in reply to the defendant's opposition to the plaintiff's Motion to Vacate. Therefore, the plaintiffs' Motion to File Overlength Memorandum should also be granted.

B. Motion to Vacate:

The plaintiffs' Motion to Vacate is based on Rule 60(b)(4) of the Utah Rules of Civil Procedure. The Motion seeks a ruling voiding a portion of the directed verdict entered on 15 May 2006 against the plaintiffs. The basis advanced in support of this motion is that the defendants did not have standing to argue that the water right in this case did not pass from Raymond Waltrous to his wife.

A motion under Rule 60(b)(4) must be filed within a reasonable time. In this case, the plaintiffs' current Motion was filed approximately 21 months after entry of the directed verdict, after decision on other post-trial motions, and following an appeal. The Court concludes the Motion is simply not timely because it was not filed within a reasonable time.

There can be no legitimate claim that standing is a new issue. Both parties agree the plaintiffs argued the issue of standing at the time of trial. The plaintiffs also raised standing in their Motion to Alter or Amend Judgment filed on 23 June 2006. The issue was again raised in the plaintiffs' appellate brief filed sometime in December of 2006. However, the plaintiffs waited until 6 February 2008 to bring this Motion to Vacate based on lack of standing.

The Court finds the plaintiffs' delay in raising this issue unreasonable. Thus, the plaintiffs' Motion to Vacate should be denied as untimely.

C. Motion for Rule 11 Sanctions:

The defendants filed a Motion for Rule 11 Sanctions on 20 March 2008. The Certificate of Mailing shows this Motion and the supporting memorandum were mailed to the plaintiffs' attorney. The plaintiffs did not respond to this Motion, and the defendants filed a Request to Submit for decision on 23 May 2008.

On 27 May 2008, the plaintiffs filed an Objection to Defendants' Request to Submit. In the Objection, the plaintiffs stated they had never received the defendants' Motion for Rule 11 Sanctions. To date, the plaintiffs have still not filed a response to Motion for Rule 11 Sanctions.

The Court is willing to give the plaintiffs the benefit of the doubt that they did not receive the Motion for Rule 11 Sanctions. Thus, it is premature to rule on this Motion.

The Motion and supporting memorandum are attached to this decision for the plaintiffs' reference. The parties are directed to follow the briefing schedule in Rule 7, Utah Rules of Civil Procedure. Either party may file a new request to submit for decision when the Motion is fully briefed.

CONCLUSION AND ORDER

Plaintiffs' Motion to Vacate is denied. Plaintiffs' Motion to Enlarge Time to File Reply Memorandum is granted. Defendants' Motion for Rule 11 Sanctions is not considered at this time. Plaintiffs' Motion to File Overlength Memorandum is granted.

DATED this 18 July, 2008.

STATE OF UTAH SIXTH DISTRICT COURTS WAYNE

Wallace A Lee

Digitally signed by Wallace A Lee
DN: cn=Wallace A Lee, c=US, o=TrustID personal certificate, ou=Utah, email=wlee@email.utcourts.gov
Reason: I am approving this document
Date: 2008.07.18 12:33:10 -06'00'

WALLACE A. LEE, Judge